DOCKET

No. 07-11191

Title:	Mark A. Briscoe and Sheldon A. Cypress, Petitioners
	v.
	Virginia
Docketed:	June 3, 2008
Lower Ct:	Supreme Court of Virginia
Case Nos.:	(070815, 070817)
Decision Date:	February 29, 2008

Questions Presented

Date	Proceedings and Orders
May 29 2008	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due July 3, 2008)
Jun 10 2008	Order extending time to file response to petition to and including August 4, 2008.
Aug 1 2008	Brief of respondent Virginia in opposition filed.
Aug 14 2008	DISTRIBUTED for Conference of September 29, 2008.
Aug 14 2008	Reply of petitioners Mark A. Briscoe, and Sheldon Cypress filed. (Distributed)
Jun 25 2009	DISTRIBUTED for Conference of June 29, 2009.
Jun 29 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jul 10 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including September 1, 2009.
Jul 10 2009	The time within which to file respondent's brief on the merits is extended to and including October 26, 2009.
Aug 21 2009	Letter, dated August 21, 2009, received from counsel for the respondent. (Distributed).
Sep 1 2009	Joint appendix filed. (Statement of costs filed)
Sep 1 2009	Brief of petitioners Mark A. Briscoe, et al. filed.
Sep 2 2009	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the petitioners.
Sep 8 2009	Brief amici curiae of Public Defender Service for the District of Columbia, et al. filed.
Oct 26 2009	Brief of respondent Virginia filed.
Nov 2 2009	SET FOR ARGUMENT ON Monday, January 11, 2010.
Nov 2 2009	CIRCULATED.
Nov 2 2009	Brief amicus curiae of United States filed. (Distributed)
Nov 2 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Nov 2 2009	Brief amici curiae of Indiana, et al. filed. (Distributed)
Nov 5 2009	Application (09A434) to extend the time to file a reply brief on the merits from November 25, 2009 to December 11, 2009, submitted to The Chief Justice.
Nov 6 2009	Application (09A434) granted by The Chief Justice extending the time to file until December 7, 2009.
Nov 27 2009	Record received from Supreme Court of Virginia (1 envelope)
Nov 30 2009	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Dec 4 2009	Additional record received from Supreme Court of VA

Dec 7 2009	Reply of petitioners Mark A. Briscoe, et al. filed. (Distributed)
Dec 8 2009	Additional record from Supreme Court of Virginia. (1 box)
Jan 11 2010	Argued. For respondent: Richard D. Friedman, Ann Arbor, Mich. For respondent: Stephen R. McCullough, Solicitor General, Richmond, Va; and Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.)

PETITION FOR WRIT OF CERTIORARI

No. 07-____

IN THE
SUPREME COURT OF THE UNITED STATES

MARK A. BRISCOE and SHELDON A. CYPRESS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

I. THE FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED BY THIS PETITION 5

II. THE DECISION OF THE SUPREME COURT OF VIRGINIA POSES A FUNDAMENTAL THREAT TO THE CONFRONTATION RIGHT 11

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR DECISION OF THE QUESTION PRESENTED 22

CONCLUSION 24

APPENDIX

Opinion of the Supreme Court of Virginia A1

Opinion and Order of the Court of Appeals of Virginia (Briscoe) A21

Opinion and Order of the Court of Appeals of Virginia (Cypress) A27

Excerpts from Virginia Code A32

Excepts from Trial Proceedings (Briscoe) A33

Certificates of Analysis (Briscoe) A79

Excerpts from Trial Proceedings (Cypress) A81

Certificate of Analysis (Cypress) A124

TABLE OF AUTHORITIES

CASES

Barnette v. State, 481 So. 2d 788 (Miss. 1985) 8-9

Briggs v. State, 789 S.W.2d 918 (Tex. Crim. 1990) 10

California v. Trombetta, 467 U.S. 479 (1984) 20

Crawford v. Washington, 541 U.S. 36 (2004) ..... passim

Gray v. Commonwealth, 265 S.E.2d 705 (1980) 18

Hinojos-Mendoza v. People, 169 P.3d 662 (Col. 2007) 21

Howell v. State, 629 S.E.2d 398 (Ga.App. 2006) 9

Long v. State, 742 S.W.2d 302 (Tex. Crim. 1987) 10

Lowery v. Collins, 988 F.2d 1364 (5th Cir. 1993) 14, 17

Lowery v. Collins, 996 F.2d 770 (5th Cir. 1993) 9-10

Lowrey v. State, 757 S.W.2d 358 (Tex.Crim.App. 1988) 14

Melendez-Diaz v. Massachusetts, No. 07-591, *cert. granted*, Mar. 17, 2008 ..... 5, 23

New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir.1944) 12

Ohio v. Roberts, 448 U.S. 56 (1980) 19

People v. McClanahan, 729 N.E.2d 470 (Ill. 2000) 8

Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986) 15

Schaal v. Gammon, 233 F.3d 1103 (8th Cir. 2000) 9

Snowden v. State, 867 A.2d 314 (Md. 2005) 7, 10, 17

State v. Belvin, ___ So.2d ___, 2008 WL 1901674 (Fl. May 1, 2008) 6-7

State v. Birchfield, 157 P.3d 216 (Or. 2007) 7, 8

State v. Campbell, 719 N.W.2d 374 (2006), *cert. denied*, 127 S.Ct. 1150 (2007 5

State v. Caulfield, 722 N.W.2d 304 (Minn. 2006) 21

State v. Coombs, 821 A.2d 1030 (N.H. 2003) 8

State v. Cunningham, 903 So.2d 110 (La. 2005) 21

State v. Drake, 2005 WL 1330844 (Tenn.Crim.App. Jun 06, 2005) 6

State v. Fisher, 563 P.2d 1012 (Kans. 1977) 10

State v. Hancock, 854 P.2d 926 (Or. 1993) 8

State v. Hughes, 713 S.W.2d 58 (Tenn. 1986) 5

State v. Kemper, 2004 WL 2218471 (Tenn. Crim. App. Sept. 30, 2004),
appeal denied (Jan. 24, 2005) 6

State v. Laturner, 163 P.3d 367 (Kans. App. 2007) (review granted Dec. 18, 2007) 21

State v. Rohrich, 939 P.2d 697 (Wash. 1997) 10

State v. Saporen, 285 N.W. 898 (Minn. 1939) 13

State v. Schaal, 806 S.W.2d 659 (Mo. 1991), *cert. denied*, 502 U.S. 1075 (1992) 9

State v. Smith, 323 S.E.2d 316 (N.C. 1984) 6

State v. Snowden, 867 A.2d 314 (Md. 2005) 8, 11

Taylor v. Illinois, 484 U.S. 400 (1988) 11

Thomas v. United States, 914 A.2d 1 (D.C. 2006) 7, 11, 17, 21

STATUTES AND RULES

27 U.S.C. § 1257(a) 1

Fed. R. Evid. 611, 803 19

Col. Rev. Stat. §16-3-309(5) 21

D.C. Code § 48-905.06 7

Fl. St. § 316.1934(5) 6-7

§ 725 I.L.C.S. 5/115-15 8

Miss. Code § 13-1-114 (repealed) 9

N.C.G.S. § 20-139.1(c1) 6

N.D.C.C. § 19-03.1-37 5

Tenn. C. § 55-10-410 5

Virginia Code § 19.2-187 et seq. ..... passim

Vt. R. Evid. 804a(b) 21

MISCELLANEOUS

Bureau of Justice Statistics, *Federal, State and Local Crime Lab Backlog Reached 500,000 in 2002* (2005), < http://www.ojp.gov/bjs/pub/press/cpffcl02pr.htm> (last viewed May 29, 2008) 18

Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs0410tab.htm> (last viewed May 29, 2008) 18

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (4th ed. rev. 2004) 7

Janeen Kerper, *The Art and Ethics of Direct Examination*, 22 AM. J. TRIAL ADVOC. 377 (1998) 14-15

EDGAR LUSTGARTEN, VERDICT IN DISPUTE (1950) 15

Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475 (2006) 19-20, 21

Note, *Right of Confrontation: Admission of Declaration by Co-Conspirator*, 85 HARV. L. REV. 188 (1971) 14

Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567 (1978) 13

Irving Younger, *The Art of Cross-Examination*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, MONOGRAPH SERIES, No. 1 (1975) 15

PETITION FOR A WRIT OF CERTIORARI

Petitioners Mark A. Briscoe and Sheldon A. Cypress respectfully petition for a writ of *certiorari* to the Supreme Court of Virginia to review the judgment against them in *Magruder v. Commonwealth*, Record Nos. 070815 (Briscoe) and 070817 (Cypress).

OPINION BELOW

The opinion of the Supreme Court of Virginia (App.A1-A20) is reported at 275 Va. 283, 657 S.E.2d 113. The opinions and orders of the Court of Appeals of Virginia (App.A21-A26 (Briscoe), App. A27-A31 (Cypress)) and the relevant trial proceedings and orders (App. A45-A76 (Briscoe), A85-A94 (Cypress)) are unpublished.

JURISDICTION

The Supreme Court of Virginia issued its decision on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

Virginia Code § 19.2-187, the text of which is set out in relevant part in the Appendix at A32, provides that in a criminal trial, in prescribed circumstances, certain certificates of analysis

reporting the results of laboratory analysis "shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein."

Virginia Code § 19.2-187.01, the full text of which is set out in the Appendix at A32a, provides that certain reports of laboratory analysis "shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination."

Virginia Code § 19.2-187.1 provides in relevant part:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 . . . shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

STATEMENT OF THE CASE

This case presents a critical issue in the development of the Confrontation Clause, one on which the states are deeply divided. If the question presented by the petition is resolved against the Petitioner, the immediate effect will be virtually to nullify the confrontation right in a very large and significant body of cases. The ultimate effect may be not only to impair the confrontation right in general but to alter fundamentally the traditional method by which criminal cases in this nation are tried.

Under the statutory scheme involved in this case, a prosecutor may introduce a certificate of the results of a forensic laboratory test, without producing the live testimony of the analyst who performed the test, or indeed of any other witness who can testify about the conduct of the test or

the chain of custody of the materials tested. The Supreme Court of Virginia assumed that such certificates are testimonial in nature within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). Nevertheless, it held that admission of the certificates in these cases was acceptable because of another portion of the statutory scheme, which explicitly gives the accused the right to call the analyst, or a person "involved in the chain of custody," as his own witness at trial, at the expense of the Commonwealth. The question presented, one on which the lower courts are sharply and irreconcilably divided, is whether such a burden-shifting scheme violates the Confrontation Clause.

The facts of these cases are easily summarized, because each fits the same mundane pattern: The petitioner was tried on charges related to the distribution of cocaine. At trial, the key question was whether substances seized by the police (from Briscoe's apartment and from a car in which Cypress was a passenger) contained cocaine, and if so how much. The principal evidence against the petitioner was a certificate of analysis (two in Briscoe's case) prepared by a forensic analyst of the Commonwealth's Department of Criminal Justice Services, Division of Forensic Science. The certificate reported test results purporting to show that the seized sub-stances contained large quantities of cocaine (36.578 grams in the case of Briscoe, App. A79-80, and 60.5 grams in the case of Cypress, App. A124-A125). The accused objected to introduction of the certificate, contending that it would violate the Confrontation Clause. App. A47 (Briscoe), A85-A86, A109-A110 (Cypress). The trial court overruled the objection and admitted the certificate. App. A66-A67, A70 (Briscoe), A92 (Cypress). The petitioner declined to call the analyst as his own witness, nor did he present any other evidence. The petitioner was convicted, and was sentenced to a lengthy term of imprisonment (20 years, with 14 years, 4 months

suspended for Briscoe; 15 years, with 10 years suspended, plus a fine of $1,000, for Cypress). The Court of Appeals affirmed, App. A21-26 (Briscoe), A27-31 (Cypress), and the petitioner then appealed to the Supreme Court of Virginia.

The appeals of these two petitioners were consolidated in that court with one other similar appeal. By a 4-3 vote, the court affirmed all three convictions. *Magruder v. Commonwealth*, 657 S.E.2d 113, 275 Va. 283 (2008), App. A1. The majority operated under the assumption that the certificates are testimonial in nature. App. A6-A7. Nevertheless, it squarely held that Virginia's statutory scheme does not violate the Confrontation Clause:

> Because the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause and because the defendants in these appeals failed to utilize that procedure, we conclude that they waived the challenges under the Confrontation Clause to the admissibility of the certificates of analysis.

App. A3. In the course of its discussion, the majority addressed directly and bluntly rejected the contention

> that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness.

"This argument," the majority said, "is not cognizable under the Confrontation Clause." App. A10.[1]

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[1] The majority also said that the defense contention raised due process concerns that were not properly before the court because no defendant subpoenaed the analyst and then said that the analyst could not testify unless the Commonwealth called him. App. A10. Whatever the merits of this avoidance argument, *see* App. A19 (Keenan, J., dissenting) ("the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights"), it is irrelevant to petitioners' Confrontation Clause contention, which (1) the court indisputably considered and rejected, (2) is the only point raised by this petition, and (3) is the issue on which the state high courts are irreconcilably divided.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL AND STATE COURTS ARE SHARPLY DIVIDED ON THE QUESTION PRESENTED BY THIS PETITION.

At least three state high courts, in addition to the Supreme Court of Virginia, have held that, given that the accused has a right to subpoena the analyst who prepared a laboratory report, the Confrontation Clause allows the prosecution to introduce the report itself without presenting the analyst as a live trial witness. *State v. Campbell*, 719 N.W.2d 374 (N.D.2006), *cert. denied*, 127 S.Ct. 1150 (2007) (applying N.D.C.C. § 19-03.1-37, under which, as explained by the court, "defendants may subpoena the report's author," 719 N.W.2d at 378, but which provides that only an indigent may subpoena a laboratory director or employee at no cost to himself: "Because neither [defendant] attempted to subpoena the forensic scientist as provided by statute, they have waived their ability to complain of a constitutional violation.");[2] *State v. Hughes*, 713 S.W.2d 58, 62 (Tenn. 1986) (applying Tenn. C. § 55-10-410: "[T]he lab technician may be subpoenaed by the accused at the State's expense and called to the stand and cross examined as a hostile witness where the State does not elect to do so. . . . [T]he accused waives the right of confrontation if the

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[2] In denying *certiorari* in *Campbell*, the Court may have concluded that the validity of burden-shifting statutes governing laboratory reports should not be decided until the underlying question of whether such reports are testimonial has been resolved. *Campbell* itself was a poor vehicle for resolving the underlying issue, because the North Dakota Supreme Court had not needed to decide that issue, given its holding that the burden-shifting scheme was permissible. 719 N.W.2d at 377-78. Now, however, the underlying issue is before the Court, in *Melendez-Diaz v. Massachusetts*, No. 07-591, *cert. granted*, Mar. 17, 2008, and it presumably will be resolved in the 2008 Term.

laboratory technician is not subpoenaed, or not called to the witness stand by either party.");[3] *State v. Smith*, 323 S.E.2d 316, 328 (N.C. 1984) (applying N.C.G.S. § 20-139.1(e1): "[T]he defendant is entitled to subpoena the analyst and examine him as an adverse witness, as on cross-examination"; "[f]ailure to summon the analyst results in a waiver of any right to examine the analyst and contest the findings").

Several state high courts, however, have expressly rejected that view. Recently, for example, in *State v. Belvin*, ___ So.2d ___, 2008 WL 1901674 (Fl. May 1, 2008), the Florida Supreme Court held unconstitutional a statutory provision, Fl. St. § 316.1934(5), that (a) purported to render admissible an affidavit of the results of a test on the alcohol content of blood or breath, but (b) provided that such admissibility "does not abrogate the right of the person tested to subpoena the person who administered the test for examination as an adverse witness" at trial. The majority first held that such an affidavit is testimonial, and that the opportunity to take a discovery deposition of the analyst did not satisfy the Confrontation Clause. And then, over the dissent of two justices who would have followed the decision of the Supreme Court of Virginia in this case, 2008 WL 1901674 at *13 (Wells, J., joined by Bell, J., concurring in part and dissenting in part), the majority held,

> Furthermore, even though section 316.1934(5) gives a defendant the right to subpoena the breath test operator as an adverse witness at trial, the statutory provision does not

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[3] *Hughes* still controls in Tennessee. State v. Kemper, 2004 WL 2218471, at *3 (Tenn. Crim. App. Sept. 30, 2004), *appeal denied* (Jan. 24, 2005) ("The rule in *Hughes* controls. The defendant has waived any right of confrontation by his failure to subpoena [the testing scientist] as a witness at trial."), *but cf.* State v. Drake, 2005 WL 1330844, at *17 (Tenn.Crim.App. Jun 06, 2005) (in a case in which the technician testified at trial, interpreting *Hughes*, inaccurately, as holding that "the legislature intended to avoid any confrontation violation by providing that admissibility of test results are [*sic*] dependent on presence of laboratory technician who performed tests).

> adequately preserve the defendant's Sixth Amendment right to confrontation. Importantly, the burden of proof lies with the state, not the defendant.

2008 WL 1901674 at *8.

To similar effect are two other post-*Crawford* high-court decisions, *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), and *State v. Birchfield*, 157 P.3d 216 (Or. 2007), explicitly rejected by the Supreme Court of Virginia in the present case. App. A10, A13. In *Thomas*, the prosecution introduced a report by a Drug Enforcement Administration chemist, declaring that bags purchased by an undercover officer contained cocaine, but the prosecution did not present the live testimony of the witness. The District of Columbia Court of Appeals held that the report was testimonial, and that the Confrontation Clause was consequently violated, notwithstanding D.C. Code § 48-905.06. That statute provides, in terms substantively similar to those of the Virginia statute involved here, "In the event that the defendant or his or her attorney subpoenas the chemist for examination, the subpoena shall be without fee or cost and the examination shall be as on cross-examination." According to the court, the prosecution's theory that the statute satisfied the Confrontation Clause by allowing the accused to call the chemist was

> contrary . . . to the plain language of the Sixth Amendment. The Confrontation Clause guarantees the accused the right "to be confronted with the witnesses against him." This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense.

914 A.2d at 16. If the accused were forced to call adverse witnesses, the court continued, "[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.'" 914 A.2d at 17, *quoting in part* CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction No. 2.08 ("Burden of Proof-Presumption of Innocence") (4th ed. rev. 2004).

The contrast with *Birchfield* is even starker. An earlier, pre-*Crawford* Oregon case, *State v. Hancock*, 854 P.2d 926 (Or. 1993), had held that if the accused subpoenaed the criminalist who prepared a laboratory report the accused could insist that the prosecution, rather than the accused himself, would make the criminalist a witness. *Birchfield*, 157 P.3d at 218. And yet, post-*Crawford*, the Oregon Supreme Court sharply rejected the argument that this ability to subpoena the criminalist satisfied the Confrontation Clause:

> The right to meet an opposing witness face to face cannot be transformed into a duty to procure that opposing witness for trial. It is the state that seeks to adduce the evidence as to which the criminalist will testify. The defendant has a constitutional right to confront the proponent of that evidence, the criminalist. The legislature may require the defendant to assert that right or to design a procedure to determine whether the defendant agrees that a written report will suffice. But, to require that a defendant do more changes the right to insist that the state present evidence the "old-fashioned way" into an obligation to procure a witness for the state.

157 P.3d at 220.

Other states in which the high courts have resolved the matter in conflict with the decision of the Supreme Court of Virginia in this case include Illinois, Mississippi, and New Hampshire. *People v. McClanahan*, 729 N.E.2d 470 (Ill. 2000) ("Trial by affidavit is the primary evil that the confrontation clause was designed to prevent. . . . We emphatically reject any notion that the State's constitutional obligation to confront the accused with the witnesses against him can be satisfied by allowing the accused [under § 725 I.L.C.S. 5/115-15] to bring the State's witnesses into court himself and then cross-examine them as part of his defense"); *State v. Coombs*, 821 A.2d 1030, 1033 (N.H. 2003) (holding that the defendant's ability to subpoena a forensic examiner "is beside the point" because "[t]he duty to confront a defendant with witnesses falls upon the State") (internal quotation omitted); *Barnette v. State*, 481 So. 2d 788, 792 (Miss. 1985)

(holding that to allow a prosecutor, over defendant's objection, to introduce laboratory report in place of live testimony, as permitted by former Miss. Code § 13-1-114, "impermissibly lessens the constitutionally required burden which is on the state to prove each element of the offense beyond a reasonable doubt, and violates the defendant's right of confrontation").

The lines thus staked out are not limited to the setting of forensic laboratory reports. In the context of a statute providing for admissibility of a child's pre-recorded statement, for example, the Missouri Supreme Court refused to find a problem if the accused were "permitted only direct, not cross, examination, in order to confront the witness"; the negative reaction of the jury to "vigorous examination of a child witness," the court believed, was inherent in the confrontation of a child witness irrespective of which party calls her to testify." *State v. Schaal*, 806 S.W.2d 659, 663 (Mo. 1991), *cert. denied*, 502 U.S. 1075 (1992).[4] But the United States District Court for the Western District of Missouri granted a habeas petition, and the United States Court of Appeals for the Eighth Circuit affirmed, holding clearly:

> [T]he State never called the child to testify on direct examination and Schaal, a defendant in a criminal case, cannot be expected to bear the burden of taking affirmative action to make the State's use of the videotape constitutional. . . . We agree with the District Court that this type of burden-shifting is impermissible and not sufficient to satisfy the Confrontation Clause.

Schaal v. Gammon, 233 F.3d 1103, 1106-07 (8th Cir. 2000). Numerous federal and state decisions are in accord. *See, e.g., Lowery v. Collins*, 996 F.2d 770, 771-72 (5th Cir. 1993) ("the Sixth Amendment is complied with when the *prosecution* calls the witness first, and *then* the defendant, for tactical or other reasons, voluntarily limits or chooses to forego cross-examination.

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[4] *See also Howell v. State*, 278 Ga.App. 634, 637-38, 629 S.E.2d 398, 404 (Ga.App. 2006) ("Howell cannot decide not to call the victim as a witness at trial, then complain on appeal that his right to confrontation was violated.").

The first step – the prosecution's initial call for the witness to testify – is crucial to the instant inquiry. Only when that is done does the failure of the defense to cross-examine the witness constitute a waiver."); *Snowden v. State*, 867 A.2d 314, 332 (Md. 2005) ("In a criminal trial, the State is required to place the defendant's accusers on the stand so that the defendant both may hear the accusations against him or her stated in open court and have the opportunity to cross-examine those witnesses."); *Long v. State*, 742 S.W.2d 302 (Tex. Crim. 1987), *overruled on other grounds*, *Briggs v. State*, 789 S.W.2d 918 (Tex. Crim. 1990); *State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) ("The opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses."). In other contexts as well, courts have recognized that "calling a declarant as a defense witness is no substitute for cross-examining that declarant as a state's witness." *State v. Fisher*, 563 P.2d 1012, 1017 (Kans. 1977).

In short, the conflict among the courts on the question presented by this petition can only be resolved by this Court. And that question is part of a broader one of immense significance, whether a prosecutor may introduce an out-of-court testimonial statement while shifting to the accused the burden of presenting the maker of the statement as a live witness at trial.

II. THE DECISION OF THE SUPREME COURT OF VIRGINIA POSES A FUNDAMENTAL THREAT TO THE CONFRONTATION RIGHT.

The decision of the Supreme Court of Virginia poses a fundamental threat to the confrontation right – immediately, within the context of forensic laboratory reports, and ultimately in general.

The Sixth Amendment gives the accused "the right . . . to *be confronted with* the witnesses against him." (Emphasis added.) The use of the passive voice in the Confrontation Clause is not adventitious. *See Thomas*, *supra*, 914 A.2d at 16 ("This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense. *State v. Snowden*, 385 Md. 64, 867 A.2d 314, 332 n. 22 (2005) (rejecting the theory that the defendant could call his accusers to the stand because 'the burden of production . . . is placed on the State [by the Confrontation Clause] to produce affirmatively the witnesses needed for its prima facie showing of the defendant's guilt')."); *Magruder*, App. A18 (Keenan, J., dissenting). As this Court has made clear, the Confrontation Clause, governing the process for witnesses *against* the accused, stands in sharp contrast to the Compulsory Process Clause, which allows the accused to bring to trial witnesses "in his favor." The right accorded by the latter Clause "is dependent entirely on the defendant's initiative"; the confrontation right, however, like most of the others granted by the Sixth Amendment, "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *see also id.* at n.14.

The difference is not a mere theoretical nicety. It has immense practical significance, going to the essence of the criminal trial process – and that is true even if, as under the Virginia

statutory scheme, the expense of bringing the witness to court is imposed on the prosecution and the accused may then ask leading questions. Even given those accommodations, it remains as true now as it did more than six decades ago that "[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *New York Life Ins. Co. v. Taylor*, 147 F.2d 297, 305 (D.C. Cir. 1944); *accord, e.g., Magruder,* App. A18-A19 (Keenan, J., dissenting) ("The opportunity for effective cross-examination of prosecution witnesses, however, presupposes that a defendant has an opportunity to cross-examine those witnesses during the prosecution's case."). It is fanciful to suggest that the two opportunities are equivalent. One cannot say that petitioners waived the confrontation right; on the contrary, petitioners vigorously demanded that they be accorded the right, and at most they waived the inferior opportunity Virginia offered them in lieu of the right. *See Magruder*, App. A19 (Keenan, J., dissenting) ("While a defendant's failure to act under Code § 19.2-187.1 may constitute a waiver of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right that is guaranteed to him throughout his criminal trial.").

To see the difference, compare the tactical decisions facing defense counsel in the two basic scenarios at issue here. The first scenario is the one that, petitioners contend, is called for by the Confrontation Clause, and so will here be labeled the Confrontation Scenario: The prosecution presents the live testimony of the lab technician, and defense counsel may then cross-examine. The second is the one provided by the Virginia statutory scheme, and will be labeled the

Subpoena Scenario. The prosecution presents a certificate of the lab results and the accused may subpoena the technician to be a live witness as part of his case. The differences are numerous and critical.

1. In the Confrontation Scenario, when counsel decides whether, and how, to examine the witness, the witness has just testified on direct.

In the Subpoena Scenario, by contrast, some time, perhaps substantial, has passed since the witness's (written) testimonial statement has been presented to the trier of fact, and presumably a much greater time since the witness made that statement. The time gap may be critical, as explained in the oft-quoted language of *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939):

> The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate application of the testing process. Its strokes fall while the iron is hot.

Accord, Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 578-79 (1978) ("Were the hearsay introduced as part of the prosecution's presentation, the jury might form an initial impression which the defense could not later counteract by examining the declarant in person once the state rested. . . . If such witnesses are to be examined at all about the truth of their statements, it should be the prosecution's duty to examine them in the first instance.").

2. In the Confrontation Scenario, immediately before cross-examination begins, the attention of the trier of fact is presumably already focused on the testimony of the witness.

In the Subpoena Scenario, by contrast, to conduct examination of the technician the defense must in effect first remind the trier of fact of the adverse statement made by the witness.

Note, *Right of Confrontation: Admission of Declaration by Co-Conspirator*, 85 HARV. L. REV. 188, 195 (1971) ("even a direct examination successful from the defendant's perspective is less effective than cross-examination because . . . the damaging hearsay will have to be repeated during the examination, thereby increasing its impact").

3. In the Confrontation Scenario, given that the witness is already on the stand, the trier of fact will not take it amiss that, at the conclusion of the prosecution's direct examination, defense counsel will in turn ask some questions.

In the Subpoena Scenario, by contrast, calling to the stand a witness whose statement has already been admitted may be annoying to the trier of fact and may appear to be harassment of the witness. E.g., *Lowery v. Collins*, 988 F.2d 1364, 1369 (5th Cir. 1993) ("The State would . . . impermissibly impose on the defendant the Catch-22 . . . of either calling the child-complainant to the stand at the 'risk [of] inflaming the jury against [himself]' or avoiding the risk of thus inflaming the jury at the cost of waiving his constitutional right to confront and cross-examine the key witness against him.") (alteration in original) (footnote omitted) (*quoting Lowrey v. State*, 757 S.W.2d 358, 359 (Tex.Crim.App. 1988)).

4. In the Confrontation Scenario, defense examination of the technician will come in the middle of the prosecution's case. If cross-examination disrupts the smooth presentation of that case, defense counsel will not be perturbed.

In the Subpoena Scenario, by contrast, assuming the defense presents other evidence, it must disrupt its own case if it wishes to examine the technician, and give the prosecution an opportunity to examine a witness friendly to it in the middle of the defense case. Janeen Kerper, *The Art and Ethics of Direct Examination*, 22 AM. J. TRIAL ADVOC. 377, 411 (1998). To avoid

giving too prominent a position to an adverse witness, the defense will probably find it best to adhere to the advice that, if one must present such a witness, it is best to do so in the middle of one's case, rather than at the beginning or end. *Id.* And if the defense does *not* present other evidence, then the adverse witness will necessarily be *both* at the beginning and at the end of the defense case.

5. In the Confrontation Scenario, if the direct testimony has been harmful to the defense – as it almost certainly has been in the case of a lab technician – counsel will nearly always find it advantageous to ask at least a few questions on cross-examination, in an attempt to chip away where possible at the testimony and to introduce some element of doubt. *See* Irving Younger, *The Art of Cross-Examination*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, MONOGRAPH SERIES, No. 1 (1975), at 1 (before discussing "destructive cross-examination," noting that even "if here is nothing to be done," counsel "may ask a couple of questions, just for show, and sit down"). By taking small, careful steps, counsel can ensure that even disappointing answers do not create significant damage. *See* EDGAR LUSTGARTEN, VERDICT IN DISPUTE (1950), at 251 (describing a careful cross-examination, in which counsel "cannot foresee the terms of [the witness's] reply: "he needs to approach the question circumspectly, advancing only one step at a time, and at every stage leaving channels of escape which he can use without grave loss of face"). Accordingly, even the hope of modest gains will make the decision to cross-examine a sound one.

In the Subpoena Scenario, by contrast, by calling to the stand an adverse witness – and one whose written testimonial statement has already been admitted against the defendant – counsel inevitably raises expectations: Why would she do this unless she expects to make a major gain? Absent such a gain, she will look foolish, having wasted time and effort, her own and that

of others, and done little but secured a re-affirmation of harmful testimony. Almost inevitably, the risk of failure will be so great that counsel will not dare take it. *See Reardon v. Manson*, 806 F.2d 39, 43 (2d Cir. 1986) ("We think it entirely plain that petitioners chose not to subpoena the chemists who assisted Dr. Reading because they perceived, as we do, that the possibility of benefit from such testimony was remote and the more likely result would have been the corroboration of Dr. Reading's testimony.").

Petitioner Cypress's case provides a vivid illustration of the difference. The critical evidence against him was the certificate purporting to report a significant quantity of cocaine in form suitable for use by a dealer in the substances seized from the car. Given the statutory scheme, the Commonwealth had no need to present the live testimony of the author of the report, and the Petitioner did not call the author to the stand. But the prosecution also presented another certificate, one indicating that no fingerprints had been found on the seized materials. Despite the Commonwealth's resistance on grounds of practicality to bringing in lab technicians, it did just that in that instance, so that the technician could explain that failure to recover fingerprints was not surprising. App. A92-93. Peripheral though this witness was to the case, defense counsel cross-examined him rather extensively, largely with respect to chain-of-custody issues that applied as well to the certificate reporting the presence of cocaine. App. A102, Tr. Tr. 57-59.

6. In the Confrontation Scenario, defense counsel may cross-examine the technician and still decide not to present an affirmative case, relying instead on a clean, uncluttered argument that the prosecution has failed to satisfy its burden of persuasion.

In the Subpoena Scenario, by contrast, the defense is forced to elect – either decline to examine the technician, or abandon (or at least severely undercut) the burden of proof argument.

See, e.g., Thomas, supra, 914 A.2d at 16 ("the 'available to the accused' theory of the Confrontation Clause is flawed because it 'unfairly requires the defendant to choose between his right to cross-examine a complaining [or other prosecution] witness and his right to rely on the State's burden of proof in a criminal case.' *Snowden*, 867 A.2d at 332-33 (quoting *Lowery v. Collins*, 988 F.2d 1364, 1369-70 (5th Cir. 1993))").

The proof of the pudding is in the eating, or lack thereof. Defense lawyers accorded a chance to cross-examine a witness who has given damaging testimony almost always take the opportunity; if instead the witness's testimony has been admitted without the witness appearing at trial, counsel almost never exercises the opportunity to call the witness on behalf of the defense.

Moreover, in the Confrontation Scenario, the accused is guaranteed the ability to cross-examine. The witness is on the stand, and cross-examination follows immediately; if the witness should suddenly become unavailable before the accused had an adequate opportunity for cross, the testimony would have to be stricken. *See Crawford, supra*, 541 U.S. at 68 (opportunity for cross essential for admissibility of testimonial statement, even given unavailability of witness). At least in Virginia's version of the Subpoena Scenario, by contrast, it appears that if the witness becomes unavailable after preparing the certificate and before trial the accused is completely out of luck; the certificate is admitted and the accused has no opportunity at all to examine the witness.[5]

For all these reasons, statutory schemes like Virginia's work a fundamental transformation

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[5] *See Gray v. Commonwealth*, 265 S.E.2d 705 (1980) (preparer of certificate unavailable as a witness at trial, the failure of the Commonwealth to comply with the filing provisions of § 19.2-187 held fatal to admissibility – the apparent implication being that had the Commonwealth filed in a timely manner the certificate would have been admissible notwithstanding the preparer's unavailability).

in traditional criminal procedure within their scope of application. The effect is to turn the heart of the trial into a presentation of affidavits. To recognize fully the significant of the threat to criminal procedure that this poses, several considerations must be taken into account.

First, because forensic laboratory reports are such an essential part of the routine of modern criminal procedure, the question presented here arises many times every day.[6]

Second, the Virginia statutory scheme is not limited to proving the *results* of a laboratory test. Section 19.2-187.01, App. A32a, applies to proof of the chain of custody of the tested materials – and it was used for that purpose here. App. A75 (Briscoe), A110-A117 (Cypress).

Third, statutory authorization is not essential for a court to implement a scheme like Virginia's. If Virginia's scheme is valid, a prosecutor and a court could replicate it even absent a burden-shifting statute. The hearsay rule would not pose a serious obstacle; if the jurisdiction does not have a special-purpose hearsay exception to cover the certificate, then its exceptions for business and public records could easily do so, and if necessary the residual exception could be invoked. *Cf.* Fed. R. Evid. 803(6) (business records), (8) (public records), 807 (residual exception). The Compulsory Process Clause would in itself give the accused the right to subpoena the author of the certificate. The prosecutor could offer to pay for the cost of producing the witness if the accused decides to subpoena him, or the court could make such

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[6] To get some sense of the scope of the issue, note that there are about a million felony convictions in state court per year, about one-third of them involving drug offenses. Bureau of Justice Statistics, *State Court Sentencing of Convicted Felons, 2004 – Statistical Tables*, <http://www.ojp.usdoj.gov/bjs/pub/html/scscf04/tables/scs04101tab.htm>. Crime laboratories processed nearly 2.5 million requests for forensic laboratory services during 2002; nearly 1.3 million requ
ests during the year, or about half of all requests, were for identification of controlled substances. Bureau of Justice Statistics, *Federal, State and Local Crime Lab Backlog Reached 500,000 in 2002* (2005), < http://www.ojp.gov/bjs/pub/press/cpflcl02pr.htm>.

payment a condition of admissibility. Finally, given that the author would be a hostile witness, the court would presumably allow the accused to ask leading questions. *Cf.* Fed. R. Evid. 611(c) (providing that "interrogation may be by leading questions" when a party calls a hostile witness). Thus, the resolution achieved by Va. Code § 19.2-187.1 could be reached without need for a comparable statute – which means that the problem posed by the decision in this case can arise in *any* state, not just those that have provided by legislation for burden-shifting.

Fourth, if the principle accepted by the Supreme Court of Virginia – that the ability of the accused to call a witness as his own may substitute for the opportunity to cross-examine – is accepted in the context of laboratory reports, there is no sound basis on which to stop it from spreading to other contexts as well. That court explicitly declined to consider the problem, App. A12-A13 n.5, perhaps because to do so would reveal the danger of the course on which it has started. It did suggest that the opportunity to cross-examine would not be worth the inconvenience created by calling the lab technician to testify. *Id.* But that is nothing more than a resuscitation of the rejected regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

The factual premise of the court's *Roberts*-style argument is faulty: Lab reports cannot be deemed so inherently trustworthy that cross-examination is of minuscule value. Pamela R. Metzger, *Cheating the Constitution*, 59 VAND. L. REV. 475, 494 (2006) ("laboratory error and operator error exist even with the most well-established or unassailable scientific method"). But of course, more fundamentally, the argument is constitutionally irrelevant. *California v. Trombetta*, 467 U.S. 479, 490 (1984) (emphasizing defendant's "right to cross-examine the law enforcement officer who administered [a breath] test, and to attempt to raise doubts in the mind of the factfinder whether the test was properly administered"). Trials could be held much more

expeditiously without *any* live witnesses, or without juries or lawyers. Such a system would not comport with the Constitution, however. Virginia could not successfully contend that it could decline to furnish counsel to indigent defendants because there are too few willing defense lawyers in the Commonwealth; nor should it prevail in contending that a system designed to limit the extent to which lab technicians testify subject to confrontation is constitutional because the Commonwealth has hired too few trained lab technicians.

The court's efficiency-oriented language is highly revealing. It suggests that Virginia's statutory scheme saves money because defendants *will not invoke the right* to call lab technicians as their own witnesses. Why not? Logically, there are only two possibilities. Either (1) the opportunity to cross-examine would be of such minuscule value that the accused would not ordinarily invoke it, or (2) though an opportunity for cross-examination might have substantial value, the opportunity offered by the statutory scheme is so far inferior that the accused would not invoke it. But if the first possibility were plausible, the cost-saving benefit could be achieved by providing that a certificate of lab results is admissible unless the accused makes a timely demand for the author of the report to appear as a witness, and that if he does so then the *prosecution* must call the author as a witness or forgo use of the certificate.

Such systems are common. For example, the District of Columbia Court of Appeals construed the District's statute as operating in this manner, because it recognized that the statute would be unconstitutional if construed as operating like the Virginia scheme. *Thomas, supra*, 914 A.2d at 16, 18. *See also, e.g., Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Col. 2007) (upholding Col. Rev. Stat. §16-3-309(5), which provides that laboratory report is admissible unless a party makes a timely request that witness "testify in person at a criminal trial on behalf of

the state": "The statute provides the opportunity for confrontation-only the timing of the defendant's decision is changed."); *State v. Cunningham*, 903 So.2d 110 (La. 2005) (citing cases endorsing such statutes); Vt. R. Evid. 804a(b) ("Upon motion of either party in a criminal or delinquency proceeding, the court shall require the child or mentally retarded or mentally ill person to testify for the state."); *State v. Laturner*, 163 P.3d 367 (Kans. App. 2007) (review granted Dec. 18, 2007). Petitioners believe such a "notice and demand" statute, if properly drafted, is constitutionally unobjectionable. *Cf. State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006) ("although there may be legitimate public policy reasons to advance the time to assert confrontation rights to a reasonable time before trial, such a shift cannot be constitutionally accomplished without adequate notice to the defendant that his failure to request the testimony of the analyst will result in the waiver of his confrontation rights, especially when the report is offered to prove an element of the offense with which the defendant is charged"); Metzger, *supra*, 59 VAND. L. REV. at 516-518 (criticizing "demand-waiver" statutes). It ensures that the lab technician will be required to testify subject to confrontation only when the accused has a strong enough interest in cross-examining him to be worth the cost to him of making the technician's testimony, presented live, far more vivid than a certificate. Such a statute satisfies the state's legitimate interest in preventing gratuitous expense. Any incremental savings generated by a burden-shifting scheme such as Virginia's must be the result of impairing the right of the accused to examine the lab technician.

III. THIS CASE PRESENTS AN IDEAL VEHICLE FOR DECISION OF THE QUESTION PRESENTED.

For several reasons, this case presents an ideal vehicle for resolution of the question presented by the petition.

First, there is no doubt as to the jurisdiction of this Court; this petition seeks review of the final decision of a state supreme court. Moreover, the case comes here on direct appeal, simplifying the question presented.

Second, the Confrontation Clause issue is clearly preserved for review by this Court. At trial, petitioners objected vigorously on Confrontation Clause grounds to admission of the certificates. The trial courts, the court of appeals, and the state supreme court all considered and rejected their arguments.

Third, there can be no plausible contention of harmless error. The certificates provided the crucial evidence for conviction, showing – if believed – not only the presence of cocaine in the materials seized but also the quantity and (in Cypress's case) the quality of cocaine, crucial issues for conviction on dealership charges. App. A104-A106 (expert testimony); A119 (prosecutor's closing argument).

Fourth, petitioners raise before this Court no other issues that might result in reversing the convictions or mitigating the sentences. The case revolves entirely on the question presented by the petition, which the Supreme Court of Virginia described as the "dispositive issue" before it. App. A6.

Finally, deciding this case would allow the Court to continue the prudent, step-by-step approach to Confrontation Clause doctrine that it has pursued beginning with its transformative decision in *Crawford*. A predicate for the question presented by this petition is the proposition that certificates of forensic laboratory reports such as those involved here are testimonial within

the meaning of *Crawford*. The question whether that proposition is true is now pending before the Court, in *Melendez-Diaz v. Massachusetts*, No. 07-591, *cert. granted*, Mar. 17, 2008. If, as petitioners expect, the Court decides that such reports are indeed testimonial, then it will be necessary for the Court to decide whether a state may shift to the accused the burden of producing a live witness at trial, as Virginia has done by the statutory scheme at issue here. There will be no reason for delay in deciding that issue. As discussed in Section I above, several states have considered the issue, post-*Crawford*, and are in irreconcilable conflict. The decisions, including that of the Virginia Supreme Court in this case, operate on the assumption that the reports are testimonial; assuming this Court's decision in *Melendez-Diaz* validates that assumption, therefore, it should not be necessary to await further consideration by the state courts or the federal courts of appeal. The question presented here will be ripe for prompt consideration, without a remand of this case, and given the massively routine recurrence of the question, further delay would be against the public interest.

The decision of the Virginia Supreme Court and others like it make clear that, as before *Crawford*, many lower courts are still treating the Confrontation Clause as a mere annoyance, to be avoided if it threatens to create substantial inconvenience. This Court must set them straight, as only it can do. All the criminal courts in the nation must understand that the Confrontation Clause is one of the central protections of our criminal justice system, and it is clearly violated when the State proves essential aspects of a case by certificate, shifting to the accused the burden of calling the witness to furnish live testimony at trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 29th day of March, 2008.

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OPPOSITION BRIEF

No. 07-11191

In the
Supreme Court of the United States

MARK A. BRISCOE AND SHELDON A. CYPRESS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If a State allows a prosecutor to introduce a certificate of forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the State avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES i

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 8

I. GRANTING CERTIORARI IN THIS CASE WOULD BE PREMATURE BECAUSE A FAVORABLE RESOLUTION OF THE ISSUE IN *MELENDEZ-DIAZ V. MASSACHUSETTS* WOULD RENDER THIS CASE MOOT 9

II. THE QUESTION PRESENTED WOULD REQUIRE A RULING ON A HYPOTHETICAL STATE LAW QUESTION THAT THE COURT BELOW REFUSED TO ADDRESS 10

III. VIRGINIA'S NOTICE-WAIVER STATUTE REPRESENTS A PERMISSIBLE AND LONG-VALIDATED REGULATION OF A DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS 11

A. States may enact reasonable rules to regulate the exercise of constitutional rights 14

B. The petitioners waived their right to confront the analyst 17

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

Page

CASES

Bell v. Virginia,
622 S.E.2d 751 (Va. Ct. App. 2005) 6

Brookhart v. Janis,
384 U.S. 1 (1966) 17

Chambers v. Mississippi,
410 U.S. 284 (1973) 17

Coolidge v. New Hampshire,
403 U.S. 443 (1971) 12

Crawford v. Washington,
541 U.S. 36 (2004) 1, 4, 9

Davis v. Washington,
547 U.S. 813 (2006) 9

Hinojos-Mendoza v. Colorado,
No. 07-9369 2

Illinois v. McClanahan,
729 N.E.2d 470 (Ill. 2000) 15

Magruder v. Virginia,
657 S.E.2d 113 (Va. 2008) 6

Massachusetts v. Verde,
827 N.E.2d 701 (Mass. 2005) 1

Mattox v. United States,
156 U.S. 237 (1895) 17

Melendez-Diaz v. Massachusetts,
No. 07-591 ..... 1, 2, 8, 9, 10

Michigan v. Lucas,
500 U.S. 145 (1991) 14, 15

TABLE OF AUTHORITIES - Continued

Page

Minnesota v. Caulfield,
722 N.W.2d 304 (Minn. 2006) 1

Pointer v. Texas,
380 U.S. 400 (1965) 15

Poulos v. New Hampshire,
345 U.S. 395 (1953) 15

Singer v. United States,
380 U.S. 24 (1965) 17

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 14

United States v. Raines,
362 U.S. 17 (1960) 13

Wigglesworth v. Oregon,
49 F.3d 578 (9th Cir. 1995) 11

Williams v. Florida,
399 U.S. 78 (1970) 14

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. VI
(Confrontation Clause) 9, 10, 11, 15

TABLE OF AUTHORITIES - Continued

Page

STATUTES

ALABAMA CODE § 12-21-300 (2006) 15

ALASKA STAT. § 12.45.084 (2006) 15

ARIZONA REV. STAT. ANN. § 36-254 (2006) 15

ARKANSAS CODE ANN. § 5-64-707 (2006) 15

ARKANSAS CODE ANN. §12-12-313 (2006) 15

COLORADO REV. STAT. § 16-3-309(5) (2006) 15

CONNECTICUT GEN. STAT. § 21a-283(b) (2006) 15

DELAWARE CODE ANN. tit. § 10, 4330-32 (2006) 15

DISTRICT OF COLUMBIA CODE ANN. § 48-905.06 (LexisNexis 2006) 15

FLORIDA STAT. ANN. § 316.1934 (West 2006) 15

FLORIDA STAT. ANN. § 327.354 (West 2006) 15

IDAHO CODE ANN. § 37-2745 (2006) 15

725 ILLINOIS COMP. STAT. ANN. 5/115-15 (West 2000) 15

IOWA CODE § 691.2 (2006) 15

KANSAS STAT. ANN. § 22-2902a (2006) 15

KANSAS STAT. ANN. § 22-3437 (2006) 15

KENTUCKY REV. STAT. ANN. § 189A.010 (West 2006) 15

LOUISIANA REV. STAT. ANN. §§ 15:499-15:501 (2006) 15

LOUISIANA REV. STAT. ANN. §§ 32:662-32:663 (2006) 15

TABLE OF AUTHORITIES - Continued

Page

MAINE REV. STAT. ANN. tit. 5, § 9057 (2006) 16

MAINE REV. STAT. ANN. tit. 6, § 205 (2006) 16

MAINE REV. STAT. ANN. tit. 17-A, § 1112 (2006) 16

MAINE REV. STAT. ANN. tit. 29-A, § 2431 (2006) 16

MARYLAND CODE ANN., CTS. & JUD. PROC. § 10-914 (West 2006) 16

MARYLAND CODE ANN., CTS. & JUD. PROC. §§ 10-1001 to 1003 (West 2006) 16

MASSACHUSETTS GEN. LAWS ch. 22C, § 39 (2006) 16

MASSACHUSETTS GEN. LAWS ch. 22C, § 41 (2006) 16

MASSACHUSETTS GEN. LAWS ch. 90, § 24 (2006) 16

MASSACHUSETTS GEN. LAWS ch. 90B § 8 (2006) 16

MASSACHUSETTS GEN. LAWS ch. 94C (2006) 16

MASSACHUSETTS GEN. LAWS ch. 111, § 13 (2006) 16

MICHIGAN COMP. LAWS § 257.625a (2006) 16

MICHIGAN COMP. LAWS § 600.2167 (2006) 16

MINNESOTA STAT. §§ 634.15-16 (2006) 16

MISSOURI REV. STAT. § 577.020 (2006) 16

MISSOURI REV. STAT. § 577.037 (2006) 16

NEBRASKA REV. STAT. § 28-1439 (2006) 16

NEVADA REV. STAT. § 50.315 (2006) 16

NEVADA REV. STAT. § 50.320 (2006) 16

NEVADA REV. STAT. § 50.325 (2006) 16

TABLE OF AUTHORITIES - Continued

Page

NEW HAMPSHIRE REV. STAT. ANN. § 215-A:11-i (2006) 16

NEW HAMPSHIRE REV. STAT. ANN. § 265:92-a (2006) 16

NEW HAMPSHIRE REV. STAT. ANN. § 270:57 (2006) 16

NEW JERSEY STAT. ANN. § 2C:35-19 (West 2006) 16

NEW MEXICO STAT. ANN. § 66-8-110 16

NEW MEXICO STAT. ANN. § 66-13-11 (LexisNexis 2006) 16

NEW YORK C.P.L.R. 4518 (McKinney 2006) 16

NEW YORK C.P.L.R. 4520 (McKinney 2006) 16

NEW YORK CRIM. PROC. LAW § 190.30 (McKinney 2006) 16

NEW YORK VEH. & TRAF. LAW § 1195 (McKinney 2006) 16

NORTH CAROLINA GEN. STAT. § 20-139.1 (2006) 16

NORTH CAROLINA GEN. STAT. § 90-95(g) (2006) 16

NORTH DAKOTA CENT. CODE § 19-03.1-37 (2006) 16

NORTH DAKOTA CENT. CODE § 39-20-07 (2006) 16

OHIO REV. CODE ANN. § 2925.51 (West 2006) 16

OKLAHOMA STAT. ANN. tit. 22 § 751 (West 2006) 16

OKLAHOMA STAT. ANN. tit. 22 § 751.1 (West 2006) 16

OKLAHOMA STAT. ANN. tit. 47 § 754 (West 2006) 16

OREGON REV. STAT. § 40.460 (2006) 16

OREGON REV. STAT. § 40.510 (2006) 16

OREGON REV. STAT. § 475.235 (2006) 16

TABLE OF AUTHORITIES - Continued

Page

75 PENNSYLVANIA CONS. STAT. ANN. § 1547 (West 2006) 16

RHODE ISLAND GEN. LAWS § 9-19-43 (2006) 16

SOUTH DAKOTA CODIFIED LAWS § 1-49-6 (2006) 16

TENNESSEE CODE ANN. § 40-28-122 (2006) 16

TENNESSEE CODE ANN. § 40-35-311 (2006) 16

TENNESSEE CODE ANN. § 55-10-407 (2006) 16

TEXAS CODE CRIM. PROC. ANN. art. 38.41 (Vernon 2006) 16

UTAH CODE ANN. § 41-6a-515 (2006) 16

UTAH CODE ANN. § 72-10-503 (2006) 16

VERMONT STAT. ANN. tit. 13, § 4816 (2006) 16

VERMONT STAT. ANN. tit. 23, § 1202 (2006) 16

VERMONT STAT. ANN. tit. 23, § 1203 (2006) 16

VIRGINIA CODE ANN. § 18.2-268.7 (2006) 16

VIRGINIA CODE ANN. § 18.2-268.9 (2006) 16

VIRGINIA CODE ANN. § 19.2-187 (2006) 6, 16

VIRGINIA CODE ANN. § 19.2-187.01 (2006) 16

VIRGINIA CODE ANN. § 19.2-187.02 (2006) 16

VIRGINIA CODE ANN. § 19.2-187.1 (2006) 4, 5, 6, 7

VIRGINIA CODE ANN. § 19.2-187.2 (2006) 16

WASHINGTON REV. CODE § 46.20.308 (2006) 16

WEST VIRGINIA CODE § 17C-5A-1 (2006) 16

WISCONSIN STAT. § 970.03 (2006) 16

TABLE OF AUTHORITIES - Continued

Page

COURT RULES

MONTANA R. EVID. 803(8) (2006) 16

SOUTH CAROLINA R. CRIM. PRO. 6 (2006) 16

WASHINGTON ST. SUPER. CT. CRIM. R. 6.13 (2006) 16

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, submits this Brief in Opposition.[1]

INTRODUCTION

In the wake of *Crawford v. Washington*, 541 U.S. 36 (2004), lower courts have struggled with the admissibility of certificates of analysis in the absence of live testimony by the forensic analyst. Some courts have concluded that such certificates are not "testimonial" while others have reached the opposite conclusion.[2] This Court granted certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591, to resolve that issue.

However, even if such certificates are "testimonial," the States have a second line of defense. Various statutes authorize the introduction of certain forensic certificates of analysis without the in-court testimony of the analyst. These statutes further provide that the defendant may ensure the presence of the analyst for

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[1] On June 10, 2008, this Court extended the time for such filing to and including August 4, 2008.

[2] *See, e.g.*, *Massachusetts v. Verde*, 827 N.E.2d 701, 705-06 (Mass. 2005) (certificate of analysis is not testimonial); *Minnesota v. Caulfield*, 722 N.W.2d 304, 313 (Minn. 2006) (certificate of analysis constitutes testimonial evidence).

cross-examination. This second line of defense will become relevant if the Court decides in *Melendez-Diaz* that certificates of analysis are "testimonial."[3]

Granting certiorari would be premature until *Melendez-Diaz* is decided. Furthermore, the petitioners rest their entire argument on a reading of Virginia state law that Virginia's highest court expressly did not address. Addressing the question presented would require this Court to hypothesize about how the Virginia statutes might operate and, thus, to hand down an advisory opinion on an abstract question of state law. Finally, the holding below, that the defendants had waived their rights by failing to ask for the presence of the analyst at trial, was correct as a matter of federal constitutional law.

STATEMENT OF THE CASE

This Petition involves two separate criminal defendants who committed separate crimes. The Supreme Court of Virginia consolidated their appeals because of the commonality of the central issue.[4]

a. Sheldon A. Cypress was a passenger in a car stopped by police in the City of Chesapeake, Virginia, for having improperly tinted windows. Pet. App. A-4. The

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[3] In addition to the present case, *Hinojos-Mendoza v. Colorado*, No. 07-9369, asks this Court to decide whether the right to confront witnesses is personal to an accused or whether counsel can waive the right.

[4] The third defendant, Michael Ricardo Magruder, whose case was consolidated with Briscoe's and Cypress's, did not seek this Court's review of the judgment of the Supreme Court of Virginia.

driver, Cypress's cousin, consented to a search of the car. Pet. App. A-4. The search yielded two bags containing a "chunky white substance." Pet. App. A-4. One of the baggies was under the passenger seat and the other was under the driver's seat. Pet. App. A-4. A test by the Department of Forensic Science concluded that the substance was cocaine. Pet. App. A-4. These test results were reflected in a certificate of analysis, which was signed by the analyst who performed the test. Pet. App. A-4, A-124. The analyst also attested that she had performed the analysis. Pet. App. A-4.

Cypress was charged with possession of cocaine with the intent to distribute, having previously committed the offense of distribution or possession with the intent to distribute. Pet. App. A-4. At trial, he objected to the admission of the certificate of analysis, contending that it was "testimonial" evidence that could not be admitted without the testimony from the forensic analyst who conducted the test. Pet. App. A-4. The trial court overruled the objections, ruling that the evidence was not testimonial. Pet. App. A-4. Cypress did not present any evidence and did not request the presence of the analyst, nor did he subpoena her. Following a bench trial, Cypress was convicted of possession of cocaine with the intent to distribute, second or subsequent offense, and he was sentenced to serve 15 years, with 10 years suspended, and a fine was imposed. Pet. App. A-4.

b. The other petitioner in this appeal is Mark A. Briscoe. During the execution of a search warrant for Briscoe's apartment in Alexandria, Virginia, police recovered two scales, a razor blade, a 100-gram weight, and a box of plastic sandwich bags. Pet. App. A-5. When they searched Briscoe, police retrieved from the front pocket of his shorts a white, rock-like substance wrapped in plastic. Pet. App. A-5. Police recovered additional suspected cocaine from the kitchen area of the apartment. Police submitted this item for testing to the Department of Criminal Justice Services, Division of Forensic Science. A forensic analyst prepared two certificates of analysis, which stated that the substances were cocaine in an amount totaling 36.578 grams. Pet. App. A-5. The analyst signed the certificates, stated that she had performed the analyses and that the certificates accurately reflected the results of the analyses. Pet. App. A-5. Briscoe was charged with possession of cocaine with the intent to distribute, conspiracy to distribute cocaine, and unlawful transportation of cocaine into the Commonwealth. Pet. App. A-5.

At his bench trial, the prosecution adduced into evidence two certificates of analysis. Pet. App. A-5. Briscoe argued that the certificates were "testimonial" evidence under the holding in *Crawford*, and therefore, admitting the certificates of analysis without the testimony of the forensic analyst constituted a violation of his right to confront witnesses. Pet. App. A-5. The trial court overruled this objection, concluding that the statutory procedure available under *Virginia Code Ann.* § 19.2-187.1 adequately protected his right to confront the analyst. Briscoe did not call the analyst to testify and did not present any evidence. The trial court

convicted him, and he was sentenced to serve a total of 20 years in prison, with all but five years and eight months suspended. Pet. App. A-5.

2. On appeal, both convictions were affirmed by Virginia's intermediate appellate court.

a. The Court of Appeals of Virginia denied Cypress's appeal in an unpublished order. *Cypress v. Virginia*, Record No. 1547-06-1 (Jan. 3, 2007). The Court assumed that a certificate of analysis was testimonial evidence, but reasoned that "a defendant's confrontation rights are nonetheless protected by the procedures provided by Code §§ 19.2-187 and 19.2-187.1." Pet. App. A-4. Because the defendant had not invoked these procedures, the court held, he had waived his right to confront the analyst. Cypress appealed to the Supreme Court of Virginia, and that Court agreed to hear his appeal.

The Court of Appeals of Virginia affirmed Briscoe's convictions by an unpublished *per curiam* order. *Briscoe v. Virginia*, Record No. 1478-06-4 (January 18, 2007). Pet. App. A-5. The Court of Appeals assumed, without deciding, that the certificate of analysis was testimonial. The Court of Appeals concluded, however, that the defendant's right to ensure the presence of the forensic analyst was protected by *Virginia Code* § 19.2-187.1. The Court of Appeals further held that by failing to avail himself of the procedure provided by this statute, Briscoe had waived his right to confront the analyst. Pet. App. A-5. Briscoe's attempt to obtain further review in that court was unsuccessful and he petitioned

for appeal in the Supreme Court of Virginia. That Court granted his petition, and consolidated his case with two other cases, including *Cypress v. Virginia*, detailed above.

3. After their appeals were consolidated with another appeal, the Supreme Court of Virginia, by a vote of 4-3, affirmed the decisions of the Court of Appeals of Virginia. *Magruder v. Virginia*, 657 S.E.2d 113 (Va. 2008). Pet. App. A-1. The Court first reasoned that it was not necessary to reach the issue of whether a certificate of analysis is testimonial evidence. Pet. App. A-6. Instead, the Court upheld the admission of the certificates of analysis under Virginia's statutory scheme. That scheme is as follows.

Under Virginia Code § 19.2-187, a "duly attested" certificate of analysis by the "person performing analysis or examination" in certain laboratories may be admitted into evidence "[i]n any hearing or trial of any criminal offense . . . as evidence of the facts therein stated and the results of the analysis or examination referred to therein." A prerequisite to admitting such a certificate of analysis is that the certificate must be "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." *Id.* Failure to follow the seven-day filing requirement precludes the admission of the certificate of analysis at trial. *Bell v. Virginia*, 622 S.E.2d 751, 754 (Va. Ct. App. 2005).

A second statute, *Virginia Code* § 19.2-187.1, sets forth a procedure for the accused to question the person performing the analysis or examination. That statute provides:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

Under this procedure, the Court observed,

> the defendants could have insured the physical presence of the forensic analysts at trial by issuing a summons for their appearance at the Commonwealth's cost, or asking the trial court or Commonwealth to do so. At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them.

Pet. App. A-8—A-9. "In short," the Court held, "if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." Pet. App. A-9.

The Court rejected the defendants' arguments that they could not be required to take affirmative steps to assert a right to confront witnesses. The Court reasoned that States can and, with some frequency do, regulate the exercise of constitutional rights. Pet. App. A-9. For example, States require defendants to provide notice when they intend to raise an alibi defense. States also impose restrictions concerning when a defendant must file a motion to suppress. Pet. App. A-9-A-10.

The Court found unpersuasive the defendants' contention that Virginia's statutory scheme forces a defendant to produce evidence. Such concerns are "due process concerns that are not before us in these appeals." Pet. App. A-10. The Court observed that none of the defendants had taken any steps to ensure the presence of the analyst at trial. Therefore, none of them were forced to call the witness to the stand. If they had, the Court noted, the trial court could have addressed "the proper order of proof." Pet. App. A-10.

Finally, the Court held that the defendants could, and did, waive their confrontation rights by failing to seek the presence of the analyst at trial. Pet. App. A-10.

REASONS FOR DENYING THE PETITION

The petition should be denied for three reasons. First, although the question presented in this case has divided the lower courts, granting certiorari would be premature. The Court has granted certiorari in *Melendez-Diaz*, No. 07-591, to address the issue of whether certificates of analysis are testimonial. Should this Court conclude that certificates of analysis are non-testimonial, this case would become moot. Until *Melendez-Diaz* is decided, there is no reason to address the issue presented by the case at bar.

Second, the question presented is hypothetical rather than concrete. The petitioners assume that under the Virginia statutory scheme at issue, they will be forced to call the analyst as his own witness. The petitioners then identify

purported constitutional flaws with this approach. However, the court below expressly declined to reach the state law issue of whether a defendant must present the testimony of the analyst or whether the prosecution must first adduce this testimony. The petitioners thus seek an advisory opinion on an hypothetical question of state law.

Finally, the decision below was correct. Virginia's statutory scheme is another example of long-validated and constitutionally permissible regulations that govern the exercise of a defendant's constitutional rights. Virginia law does not impermissibly infringe on the exercise of a defendant's right to confront witnesses.

I. GRANTING CERTIORARI IN THIS CASE WOULD BE PREMATURE BECAUSE A FAVORABLE RESOLUTION OF THE ISSUE IN *MELENDEZ-DIAZ V. MASSACHUSETTS* WOULD RENDER THIS CASE MOOT.

On March 17, 2008, this Court granted the petition for a writ of certiorari in *Melendez-Diaz v. Massachusetts*, 128 S. Ct. 1647 (2008). The question presented in that case is "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence subject to the demands of the Confrontation Clause as set forth in *Crawford v. Washington*, 541 U.S. 36 (2004)." *Melendez-Diaz*, No. 07-591, Brief for Petitioners at i (June 16, 2008). If *Melendez-Diaz* is decided in favor of the government, this petition would become moot. Therefore, granting certiorari in the case at bar would be premature.

Following the decision in *Crawford*, the critical inquiry under the Confrontation Clause is whether a particular statement is "testimonial." *Davis v.*

Washington, 547 U.S. 813, 821 (2006). If a statement is not testimonial, it "is not subject to the Confrontation Clause." *Id.* As Massachusetts and certain amici will argue, certificates of analysis such as the ones at issue here are not testimonial in nature. The petitioners' entire argument in the case at bar is predicated upon the "testimonial" nature of such certificates of analysis. *See* Pet. at 23. It would serve little purpose to grant certiorari, only to dismiss the case at a later juncture on mootness grounds.

Oral argument in *Melendez-Diaz* is scheduled for November 10, 2008. The issue presented in this case has received considerable attention from the lower courts, so there will be no shortage of opportunities for the Court to address the issue in the future – should the issue not become mooted by the outcome in *Melendez-Diaz*. Rather than hold the petition in abeyance for a lengthy period of time, the Court should deny certiorari.

II. THE QUESTION PRESENTED WOULD REQUIRE A RULING ON A HYPOTHETICAL STATE LAW QUESTION THAT THE COURT BELOW REFUSED TO ADDRESS.

The petitioners frame the question presented in the following terms: when "a state allows a prosecutor to introduce a certificate of forensic laboratory analysis, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?" Pet. i. This question assumes at its foundation that Virginia law forces a defendant to call the analyst as a part of the defense case. The petitioners then construct an

elaborate argument on this foundation, seeking to establish that this procedure is constitutionally infirm. Pet. 11-22.

However, the Supreme Court of Virginia expressly declined to reach the state law question of whether the defendant, rather than the prosecutor, must call the analyst. Pet. App. A-10. The Court below began by pointing out that under Virginia's statutory scheme, a defendant can ensure that the analyst is present for cross-examination at trial in three ways: "by issuing a summons for their appearance at the Commonwealth's cost, or asking the trial court or the Commonwealth to do so." Pet. App. A-9. The Court observed that the petitioners did not avail themselves of any of these options. Pet. App. A-9. Turning to the argument that the petitioners were impermissibly forced "to call the forensic analyst in order to exercise [the] right to confront that witness," the Court observed that this argument "raises due process concerns that are not before us in these appeals." Pet. App. A-10.[5] The Court held that

> [b]ecause the defendants did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness."

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[5] At least one other court has reached the same conclusion, *i.e.* that forcing a defendant to adduce evidence from the analyst constitutes a due process problem. *See Wigglesworth v. Oregon*, 49 F.3d 578, 581 (9th Cir. 1995). The petitioners do not raise any due process issue in this Court. Assuming for purposes of argument that the Court below was incorrect in concluding that the petitioners' arguments sounded in due process rather than under the Confrontation Clause, the petitioners do not ask this Court to rectify that conclusion. Therefore, that aspect of the lower court's holding is final.

Pet. App. A-10. In other words, the Court never reached the issue of how matters should proceed under Virginia law once a defendant takes the initial step of ensuring the presence of the analyst.

The petitioners' argument thus rests on an unsupported assumption regarding state law. In practice, a trial court can easily obviate the purported problems the petitioners identify. A Virginia trial court can simply require the prosecution to present the analyst's testimony – provided that a defendant has taken the *de minimis* step of ensuring the presence of the analyst. Indeed, Virginia took the view in the Court below that, to avoid any constitutional ambiguity in the statute, once the defendant has requested the presence of the analyst, the *prosecution* "should subpoena the witness and present the testimony of the witness during its case in chief." Brief for the Commonwealth, *Magruder v. Virginia*, at 17. The issue simply did not arise in the cases at bar, because none of the petitioners took the preliminary step of ensuring that the analyst was present.[6]

To illustrate, suppose that a defendant seeks mid-trial to exclude evidence that he claims was seized impermissibly in a warrantless search. He further asserts that Virginia impermissibly places on a defendant the burden of proving that a warrantless search of his home was lawful and that, instead, the State should bear that burden. *See, e.g., Coolidge v. New Hampshire*, 403 U.S. 443,

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[6] Of course, if the defendant wishes to or does not object, he can call or cross-examine the analyst as a part of the defense case rather than during the prosecution's case in chief. There may be sound tactical reasons for doing so.

453-55 (1971) (burden of establishing constitutionality of warrantless search rests with the prosecution). In that circumstance, the defendant's failure to file a timely suppression motion would preclude the court from reaching the issue. The court would not reach the issue of the propriety of the allocation of the burden of proof because the defendant did not take a necessary first step of filing a suppression motion. That is comparable to what occurred here. The petitioners never took any steps to ensure the presence of the analyst. Therefore, the lower courts never addressed the argument that the petitioners are forced to place the analyst on the stand was never addressed by the trial court or the court on appeal.

If, in a *future case*, a Virginia defendant – one who ensures the presence of the analyst – is forced, over his objection, to call the analyst, the issue the petitioners' attempt to raise in this Court will be squarely presented. That, however, is a purely hypothetical scenario and one that did not arise here. The petitioners are asking this Court to invalidate a conviction based on a hypothetical scenario. In the context of facial challenges, the Court has held that "the delicate power of pronouncing [a statute] unconstitutional is not to be exercised with reference to hypothetical cases" imagined by a litigant. *United States v. Raines*, 362 U.S. 17, 22 (1960). Had the petitioners taken the simple step of ensuring the presence of the analyst, they could have urged the court to require the prosecution to place the analyst on the stand. The trial court was simply never in a position to address the issue, however, because the analyst was not there. As a result, on appeal, the Supreme Court of Virginia properly declined to reach the issue.

Because the petitioners seek "nothing more than a hypothetical judgment – which comes to the same thing as an advisory opinion, disapproved by this Court from the very beginning," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998), certiorari should be denied.

III. VIRGINIA'S NOTICE-WAIVER STATUTE REPRESENTS A PERMISSIBLE AND LONG-VALIDATED REGULATION OF A DEFENDANT'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS.

A. States may enact reasonable rules to regulate the exercise of constitutional rights.

The States have long imposed rules governing all aspects of a criminal trial, including the exercise of constitutional rights. For example, a requirement that a defendant file a notice that he intends to pursue an alibi defense does not violate the Sixth Amendment. *Williams v. Florida*, 399 U.S. 78, 82-83 (1970). States can also require defendants who wish to impeach the victim of a sexual crime with her past sexual conduct to file a notice of their intent to do so without infringing on a defendant's constitutional rights. *Michigan v. Lucas*, 500 U.S. 145, 152-53 (1991). In *Lucas*, the Court noted that "[t]he notice-and-hearing requirement serves legitimate state interests in protecting against surprise, harassment, and undue

delay." *Id.*[7] Similarly, the States can impose reasonable rules of procedure to govern the exercise of rights under the Confrontation Clause.[8]

With respect to certificates of analysis of drugs, the identity of the substance is seldom at issue. The substance is identified pursuant to routine, simple and well-established scientific testing. The test is performed by an analyst with no connection to the investigation and who has no reason to falsify the result. In the overwhelming majority of cases, defendants have nothing to gain by cross-examining the analyst. It is hardly surprising that nearly every State has a statutory framework in place that authorizes as a default the introduction of certain certificates of analysis and asks a criminal defendant to take some step to ensure the presence of a forensic analyst.[9]

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[7] *See also Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953) (State may establish reasonable procedures that must be followed to exercise First Amendment rights).

[8] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. This guarantee applies to the States as well as to the United States government. *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

[9] Alabama: ALABAMA CODE § 12-21-300 (2006); Alaska: ALASKA STAT. § 12.45.084 (2006); Arizona: ARIZONA REV. STAT. ANN. § 36-254 (2006); Arkansas: ARKANSAS CODE ANN. §§ 5-64-707, 12-12-313 (2006); Colorado: COLORADO REV. STAT. § 16-3-309(5) (2006); Connecticut: CONNECTICUT GEN. STAT. § 21a-283(b) (2006); Delaware: DELAWARE CODE ANN. tit. § 10, 4330-32 (2006); District of Columbia: DISTRICT OF COLUMBIA CODE ANN. § 48-905.06 (LexisNexis 2006); Florida: FLORIDA STAT. ANN. §§ 316.1934, 327.354 (West 2006); Idaho: IDAHO CODE ANN. § 37-2745 (2006); Illinois: 725 ILLINOIS COMP. STAT. ANN. 5/115-15 (West 2000) (*but see Illinois v. McClanahan*, 729 N.E.2d 470, 478 (Ill. 2000), holding the statute unconstitutional); Iowa: IOWA CODE § 691.2 (2006); Kansas: KANSAS STAT. ANN. §§ 22-2902a, 22-3437 (2006); Kentucky: KENTUCKY REV. STAT. ANN. § 189A.010 (West 2006); Louisiana: LOUISIANA REV. STAT. ANN. §§ 15:499-15:501, 32:662-32:663 (2006); Maine: MAINE REV. STAT. ANN. tit. 5, § 9057; tit. 6, § 205; tit. 17-A, § 1112;

Requiring a defendant to provide notice that he wishes to have the analyst present for cross-examination, like the statutes requiring notice of an alibi or notice of the intent to explore the sexual history of the victim, is a constitutionally permissible measure. The right of an accused to confront and cross-examine is "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295

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tit. 29-A, § 2431 (2006); Maryland: MARYLAND CODE ANN., CTS. & JUD. PROC. §§ 10-914, -1001 to -1003 (West 2006);) Massachusetts: MASSACHUSETTS GEN. LAWS ch. 22C, §§ 39, 41; ch. 90, § 24; ch. 90B, § 8; ch. 94C; ch. 111, § 13 (2006)); Michigan: MICHIGAN COMP. LAWS §§ 257.625a, 600.2167 (2006); Minnesota: MINNESOTA STAT. §§ 634.15-16 (2006); Missouri: MISSOURI REV. STAT. §§ 577.020, 577.037 (2006); Nebraska: NEBRASKA REV. STAT. § 28-1439 (2006); Nevada: NEVADA REV. STAT. §§ 50.315, 50.320, 50.325 (2006); New Hampshire: NEW HAMPSHIRE REV. STAT. ANN. §§ 215-A:11-i, 265:92-a, 270:57 (2006); New Jersey: NEW JERSEY STAT. ANN. § 2C:35-19 (West 2006); New Mexico: NEW MEXICO STAT. ANN. §§ 66-8-110, 66-13-11 (LexisNexis 2006); New York: NEW YORK VEH. & TRAF. LAW § 1195 (McKinney 2006), NEW YORK C.P.L.R. 4518, 4520 (McKinney 2006), NEW YORK CRIM. PROC. LAW § 190.30 (McKinney 2006); North Carolina: NORTH CAROLINA GEN. STAT. §§ 20-139.1, 90-95(g) (2006); North Dakota: NORTH DAKOTA CENT. CODE §§ 19-03.1-37, 39-20-07 (2006); Ohio: OHIO REV. CODE ANN. § 2925.51 (West 2006); Oklahoma: OKLAHOMA STAT. ANN. tit. 22 §§ 751, 751.1; tit. 47, § 754 (West 2006); Oregon: OREGON REV. STAT. §§ 40.460, 40.510, 475.235 (2006); Pennsylvania: 75 PENNSYLVANIA CONS. STAT. ANN. § 1547 (West 2006); Rhode Island: RHODE ISLAND GEN. LAWS § 9-19-43 (2006); South Dakota: SOUTH DAKOTA CODIFIED LAWS § 1-49-6 (2006); Tennessee: TENNESSEE CODE ANN. §§ 40-28-122, 40-35-311, 55-10-407 (2006);); Texas: TEXAS CODE CRIM. PROC. ANN. art. 38.41 (Vernon 2006); Utah: UTAH CODE ANN. §§ 41-6a-515, 72-10-503 (2006); VERMONT STAT. ANN. tit. 13, § 4316; tit. 23, §§ 1202, 1203, (2006); Virginia: VIRGINIA CODE ANN. §§ 18.2-268.7, 18.2-268.9, 19.2-187, 19.2-187.01, 19.2-187.02, 19.2-187.2 (2006); Washington: WASHINGTON REV. CODE § 46.20.308 (2006); West Virginia: WEST VIRGINIA CODE § 17C-5A-1 (2006); Wisconsin: WISCONSIN STAT. § 970.03 (2006); Montana: MONTANA R. EVID. 803(8) (2006); South Carolina: SOUTH CAROLINA R. CRIM. PRO. 6 (2006); Washington: WASHINGTON ST. SUPER. CT. CRIM. R. 6.13 (2006).

(1973).[10] As noted above, the Supreme Court of Virginia has not settled the question of how matters must proceed once the defendant provides the required notice that he wishes to have the forensic analyst present. However, the requirement that the defendant provide notice to ensure the presence of the analyst is a constitutionally permissible regulation of the exercise of the right to confront witnesses.[11]

B. The petitioners waived their right to confront the analyst.

The court below correctly concluded that a defendant who fails to ensure the presence of the analyst has waived his right to confront the analyst. It is settled law that, like other constitutional rights, the right to confront witnesses can be waived. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Singer v. United States*, 380 U.S. 24, 35 (1965). Although the petitioners contend that they "vigorously demanded" their right to confront the analyst, Pet. at 12, they did not avail themselves of the mechanism to ensure that confrontation took place, either by notifying the prosecution or the court that they wished to have the analyst present, or by issuing a subpoena for the analyst. Pet. App. A-9. The court below correctly concluded that this failure constituted a waiver. Certiorari should be denied.

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[10] *See also Mattox v. United States*, 156 U.S. 237, 243 (1895) (noting that confrontation of witnesses "must occasionally give way to considerations of public policy and the necessities of the case.").

[11] Indeed, the petitioners agree that some notice waiver statutes are constitutionally valid. Pet. at 21.

CONCLUSION

For reasons stated above, the Petition for a Writ of Certiorari should be DENIED.

Respectfully submitted,

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August 1, 2008

CERTIFICATE OF SERVICE

On August 1, 2008, I served one copy of THE COMMONWEALTH OF VIRGINIA'S BRIEF IN OPPOSITION upon all parties required to be served, by United States Postal Service in accordance with Rule 29(3), as follows:

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REPLY BRIEF

No. 07-11191

IN THE
SUPREME COURT OF THE UNITED STATES

MARK A. BRISCOE and SHELDON A. CYPRESS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 1

I. This Petition Offers an Ideal Opportunity for Prompt Resolution of the Question Presented. 2

II. The Supreme Court of Virginia Construed the Statute in Accordance With Its Plain Terms, and Explicitly Provided That the Procedures It Provides Comply With the Confrontation Clause. 3

III. Petitioners Did Not Waive Their Confrontation Rights By Declining to Invoke a Procedure That Fails to Protect Those Rights. 7

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 2-3

Jones v. United States, 523 U.S. 1045 (1998) (grant of certiorari) 2-3

Jones v. United States, 526 U.S. 227 (1999) (merits decision) 3

Melendez-Diaz v. Massachusetts, No. 07-591 1-3

STATUTES

Virginia Code § 19.2-187 4

Virginia Code § 19.2-187.1 3-6

SUMMARY OF ARGUMENT

The Commonwealth's Brief in Opposition ("BIO") acknowledges that the Question Presented by the Petition is an important one on which the lower courts are divided. It acknowledges as well that, assuming this Court holds in *Melendez-Diaz v. Massachusetts*, No. 07-591, that certificates of laboratory reports are testimonial, the Question Presented will be ripe for decision by this Court. The Commonwealth's principal basis for opposition to the Petition is its contention that this case is a poor vehicle for decision of the Question Presented. But it can make that argument only by describing the proceedings below in a potentially misleading manner, by misstating the holding of the Supreme Court of Virginia, and by suggesting an implausible reading of the relevant statute.

ARGUMENT

The Commonwealth frankly acknowledges the critical facts supporting a grant of certiorari in this case: This Court granted certiorari in *Melendez-Diaz v. Massachusetts*, No. 07-591, to resolve the question whether certificates of forensic analysis are testimonial for purposes of the Confrontation Clause. BIO at 1. Statutes of the sort involved in this case are "a second line of defense" raised by some states to a claim that the admission of such a certificate absent live testimony by the author violates the Confrontation Clause. *Id.* The question whether such statutes are valid – the Question Presented in this case – is a frequently recurring one, *id.* at 10, and it "has divided the lower courts." *Id.* at 8. If this Court determines in *Melendez-Diaz* that the certificates are testimonial – a proposition assumed by the Supreme Court of Virginia, App. A6, for purposes of its decision in this case – then the Question Presented will also be ripe for resolution. BIO at 2 ("Granting certiorari would be premature until *Melendez-Diaz* is decided.").

Given these undisputed, and indisputable, facts, the Commonwealth is able to offer only specious arguments against granting the writ.

I. This Petition Offers an Ideal Opportunity for Prompt Resolution of the Question Presented.

The Commonwealth first argues that the Court should not "hold the petition in abeyance for a lengthy period of time" until the decision in *Melendez-Diaz*, before which a grant of certiorari would be premature. *Id.* at 10. Petitioners agree that the Petition should not be granted before the Court decides *Melendez-Diaz*, and that if the Court holds in that case that certificates of forensic analysis are not testimonial there would be no basis for granting the Petition. But if (as Petitioners believe is probable) the Court holds that such certificates are testimonial, then it would be appropriate for the Court to consider whether burden-shifting statutes like Virginia's nevertheless satisfy the Confrontation Clause. Given the importance of the issue, it would be important for the matter to be resolved promptly. Huge numbers of cases, of course, depend on that resolution in states having burden-shifting statutes. Moreover, it is inevitable that legislatures in states that do not now have such statutes, facing the newly determined doctrine that the certificates are testimonial, would consider adopting what the Commonwealth has here called "a second line of defense." This Petition would present an ideal opportunity for the necessary prompt resolution. There would be no need to remand to the Supreme Court of Virginia; that court has already decided the case on the assumption that the certificates are testimonial.

Holding the Petition pending the decision in *Melendez-Diaz* and then granting certiorari promptly, without a remand, would be entirely consistent with the Court's prior practice.[1] Nor

[1] For example, the Court decided Almendarez-Torres v. United States, 523 U.S. 224 (1998), on March 24, 1998. Six days later, it granted certiorari in Jones v. United States, 523

would it problematic to postpone consideration of this Petition by a few months until *Melendez-Diaz* is decided. Suppose the Court decides *Melendez-Diaz* in mid-February, more than three months after the argument date. That would be less than one year after the decision of the court below, less than nine months after the filing of the Petition, and less than five months after the date the Court first considers the Petition. None of these time periods would be at all unusual.[2]

II. The Supreme Court of Virginia Construed the Statute in Accordance With Its Plain Terms, and Explicitly Provided That the Procedures It Provides Comply With the Confrontation Clause.

The Commonwealth's second, and principal, argument is that the Question Presented is raised only in the hypothetical by this Petition. There is no merit to this argument. To make it, the Commonwealth must misstate the holding below, suggest (without actually advocating) an implausible reading of the applicable statute, and make a potentially misleading statement about the proceedings below.

Petitioners contend that the applicable statute, Virginia Code § 19.2-187.1, violates the Confrontation Clause by forcing the accused, if he wishes to examine the author of the certificate,

---

U.S. 1045 (1998), and later explained that it did so "[b]ecause of features arguably distinguishing this case from *Almendarez-Torres*." Jones v. United States, 526 U.S. 227, 232 (1999).

[2] Though citations are hardly necessary to demonstrate the point to this Court, it may be highlighted by the following illustration. On January 7 of this year, the Court granted, vacated, and remanded in 28 cases that had been decided by the respective courts below more than one year previously. In 26 of those cases, the petition had been filed more than nine months previously, and in 24 of them the first conference had been held more than five months previously.

The 28 cases are listed below by docket number; those in which the petition had been filed more than nine months previously are in bold, and those in which the first conference was held more than five months previously are in italics. Nos. 05-***11144***, ***11308***, ***11659***, 06-***378***, **1311**, ***6079***, ***6222***, ***6445***, ***6637***, ***7290***, ***7591***, ***7600***, ***7774***, ***7779***, ***7784***, ***7975***, ***8086***, ***8168***, ***8498***, ***8679***, ***9210***, ***9749***, ***9864***, ***9998***, ***10045***, **10277**, 11525, 11903.

to call her as a witness himself; the Petition summarizes reasons why this procedure does not provide the equivalent of cross-examination.

In an attempt to characterize the Petition as not properly presenting this issue, the Commonwealth contends that (1) perhaps the statute can be read as requiring the Commonwealth to call the author to the witness stand if the accused makes a timely demand of his presence;(2) that court left unresolved whether the statute so provides; (3) it contended in the Supreme Court of Virginia that the statute so provides; (4) because of a procedural default by the defendants, that court also left unresolved whether, if the statute does not so provide, it would violate the Confrontation Clause. BIO at 10-14. But the statute plainly precludes the implausible reading that the Commonwealth suggests – a reading that is inconsistent with the positions taken by the Commonwealth itself in litigating the cases against the Petitioners. The Supreme Court of Virginia read the statute in accordance with its plain terms. And it squarely held that the problems raised by Petitioners do not constitute a violation of the Confrontation Clause.

1. As stated in the Petition, Virginia Code § 19.2-187.1 provides in relevant part:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 . . . shall have the right *to call the person* performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

(emphasis added)

The procedure provided by the statutory scheme is clear. Section 19.2-187 provides for admission of the certificate as part of the prosecution's case-in-chief. If the accused wishes to examine the analyst, he has "the right to call [the analyst] . . . as a witness," and the accused may then examine the analyst "as if" the analyst "had been called as an adverse witness." There is no suggestion in the

statute that instead what it means is that if the accused requests the presence of the analyst, the Commonwealth must present the analyst as a witness or forgo use of the certificate.

2. The Supreme Court of Virginia did not introduce such a suggestion. On the contrary, it construed the statute expressly in accordance with its plain terms, saying: "At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses . . ." App. A9. The meaning of the statute cannot plausibly be regarded as in doubt.

3. The Commonwealth says, "Virginia took the view in the Court below that, to avoid any constitutional ambiguity in the statute, once the defendant has requested the presence of the analyst, the *prosecution* should subpoena the witness and present the testimony of the witness during its case in chief." Brief for the Commonwealth, *Magruder v. Virginia*, at 17." BIO at 12 (emphasis in original). Given the clear statement, quoted above, by the Supreme Court of Virginia, the contentions previously raised by attorneys for the Commonwealth are of no significance. But in any event, the assertion now made by the Commonwealth is potentially misleading. *Magruder* consolidated three cases – those of the two Petitioners and that of Michael Magruder, who is not petitioning this Court for certiorari. Each case was briefed and argued by a different Assistant Attorney General. In the Petitioners' cases, the Commonwealth's attorneys construed the statute in accordance with its plain terms. Brief for the Commonwealth, *Cypress v. Virginia*, at 7 (arguing that under § 19.2-187.1 the accused has the right to summon the analyst and to treat her as an adverse witness, which "is synonymous with cross-examination"); Brief for the Commonwealth, *Briscoe v. Virginia*, at 21 (arguing that § 19.2-187.1 "affords the defendant the absolute right to call the preparer . . . as an averse witness"). And before this Court, the Commonwealth, while citing the

historical fact of the argument made by its attorney in *Magruder*, notably fails to endorse that argument. This Court should not be misled: The statute means what it says, the highest court of the Commonwealth has affirmed that meaning, and the Commonwealth cannot introduce any plausible doubt on that score.

4. The Commonwealth also contends that the Supreme Court of Virginia did not resolve the Confrontation Clause question presented by the Petitioners. That is simply not so. As the Petition itself recites, at 4, the Supreme Court of Virginia addressed directly and bluntly rejected the contention

> that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness.

"This argument," the majority said, "is not cognizable under the Confrontation Clause." App. A10. That, in clear and simple terms, is a rejection of the Confrontation Clause argument presented here by the Petitioners. The majority reached that conclusion because of its perception that "if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." App. A9. But of course the Petitioners' contention is precisely that the statutory procedure does *not* offer an adequate opportunity for cross-examination or its equivalent, for the reasons summarized in the Petition.

The majority also said that the defense contention raised due process concerns that were not properly before the court because no defendant subpoenaed the analyst and then said that the analyst could not testify unless the Commonwealth called him. App. A10. It is highly dubious that a defendant should be precluded from raising a contention under the Due Process Clause by failing to go through the motion of subpoenaing the analyst. But the Petitioners do not raise a Due Process

challenge. They only raise a Confrontation Clause challenge. *That* challenge was indisputably considered and sharply rejected by the Supreme Court of Virginia. And whether that challenge is sound is the issue on which the state high courts are irreconcilably divided.

III. Petitioners Did Not Waive Their Confrontation Rights By Declining to Invoke a Procedure That Fails to Protect Those Rights.

Finally, the Commonwealth contends that the holding of the Supreme Court of Virginia was correct as a matter of constitutional law. Its arguments add nothing to those already considered.

The Commonwealth contends that a state may validly require that an accused make a timely demand for confrontation. Petitioners have already acknowledged this point. Petition at 21. If that is all the statute did, then the cases would stand in a far different footing. But, especially in light of the explicit construction given by the Supreme Court of Virginia, the Commonwealth has no plausible basis for contending that the statute might be read as a simple notice-and-demand statute.

The Commonwealth also contends that each Petitioner waived the confrontation right by "fail[ing] to ensure the presence of the analyst" in accordance with the statutory scheme. But an accused cannot be held to have waived a constitutional right by declining to invoke a procedure that fails to protect that right. And of course the essence of the Petitioners' contention in this Court is precisely that the statutory scheme fails to protect the confrontation right. In each case, the Petitioner had no realistic basis on which to believe that, if he subpoenaed the analyst, his confrontation right would be protected – a result that could have followed only if the Virginia courts rewrote the statutory scheme (which they have declined to do) to require that the Commonwealth either put the analyst on the witness stand as part of its case-in-chief or forgo use of the certificate. Petitioners did not prevent this Court from vindicating their constitutional rights by declining to invoke the

procedure that they contend is constitutionally invalid. Put another way, the Commonwealth's "waiver" argument is nothing more than a merits argument defending the decision below; it does not suggest any impediment to reaching the Question Presented.

CONCLUSION

For the reasons stated above and in the Petition for a Writ of Certiorari, the Petition should be granted.

RESPECTFULLY SUBMITTED this 14th day of August, 2008.

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JOINT APPENDIX

No. 07-11191

Supreme Court, U.S.
FILED
SEP 1 - 2009
OFFICE OF THE CLERK

In The Supreme Court of the United States

MARK A. BRISCOE and SHELDON A. CYPRESS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

JOINT APPENDIX

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Petition For Certiorari Filed May 29, 2008
Certiorari Granted June 29, 2009

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TABLE OF CONTENTS

Page

RELEVANT DOCKET ENTRIES

For Petitioner Briscoe 1

For Petitioner Cypress 2

For Petitioners Jointly 3

RECORD FOR PETITIONER BRISCOE

Certificates of Analysis 4

Amended Grand Jury Indictment 9

Excerpts from Trial Proceedings 11

Trial Order 68

Sentencing Order 71

One-Judge Opinion of the Court of Appeals of Virginia 75

Three-Judge Opinion of the Court of Appeals of Virginia 82

RECORD FOR PETITIONER CYPRESS

Certificate of Analysis 84

Grand Jury Indictment 88

Excerpts of Trial Proceedings 90

Defense Bench Memorandum 159

Trial Order 169

Sentencing Order 172

TABLE OF CONTENTS – Continued

Page

One-Judge Opinion of the Court of Appeals of Virginia.....176

Three-Judge Opinion of the Court of Appeals of Virginia.....181

RECORD FOR PETITIONERS JOINTLY

Opinion and Dissent of the Supreme Court of Virginia.....182

Order of the Supreme Court of the United States Granting In Forma Pauperis Status and Certiorari 234

Docket Entries from the Courts Below

Docket Entries for Petitioner Briscoe

Circuit Court for the City of Alexandria

May 2, 2005	Grand Jury Indictment
Jun. 16, 2005	Bench Trial, Petitioner Found Guilty
Jun. 17, 2005	Trial Order Entered
Aug. 18, 2005	Motion To Set Aside Verdicts Denied
Aug. 18, 2005	Petitioner Sentenced
Sep. 6, 2005	Final Order Entered

Court of Appeals of Virginia

Oct. 10, 2005	Notice of Appeal Filed
Feb. 28, 2006	Appeal Dismissed
Jun. 14, 2006	Notice of Appeal Filed
Oct. 12, 2006	Petition for Appeal Filed
Jan. 18, 2006	One-Judge Opinion Issued, Appeal Denied
Mar. 26, 2006	Three-Judge Opinion Issued, Appeal Denied

Supreme Court of Virgina

Apr. 25, 2007	Petition for Appeal Filed
Jul. 31, 2007	Petition for Appeal Granted

Docket Entries for Petitioner Cypress

Circuit Court for the City of Chesapeake

Dec. 6, 2005	Grand Jury Indictment
Apr. 6, 2006	Bench Trial, Petitioner Found Guilty
Apr. 19, 2006	Trial Order Entered
Jun. 9, 2006	Petitioner Sentenced
Jun. 26, 2006	Sentencing Order Entered

Court of Appeals of Virginia

Jun. 21, 2006	Notice of Appeal Filed
Aug. 29, 2006	Petition for Appeal Filed
Jan. 3, 2007	One-Judge Opinion Issued, Appeal Denied
Mar. 23, 2007	Three-Judge Opinion Issued, Appeal Denied

Supreme Court of Virginia

Apr. 25, 2007	Petition for Appeal Filed
Aug. 2, 2007	Petition for Appeal Granted

Docket Entry for Petitioners Jointly

Supreme Court of Virginia

Feb. 29, 2008	Opinion Issued, Convictions Affirmed

Certificates of Analysis (Briscoe)

CIRCUIT COURT
CITY OF ALEXANDRIA, VIRGINIA

[SEAL] ORIGINAL

Commonwealth of Virginia
Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

May 19, 2005
(Filed May 24, 2005)

Northern Laboratory
9797 Braddock Road
Suite 200
Fairfax, VA 22032
Tel. No.: (703) 764-4600
Fax: (703) 764-4633

TO: **CHRISTOPHER FLOOD**
ALEXANDRIA POLICE DEPARTMENT
2003 MILL ROAD
ALEXANDRIA, VA 22314

FS Lab # N05-1478

Your Case #: 05-106840
Victim(s): ---
Suspect(s): BRISCOE, Mark

Evidence Submitted By: Christopher Flood
Date Received: 02/16/2005

Item 1 Sealed packaging containing one plastic bag corner containing off-white chunky solid material

RESULTS:

Item 1 Cocaine (Schedule II), 2.573 grams of solid material.

Attest:

I certify that I performed the above analysis or examination as an employee of the Division of Forensic Science and that the above is an accurate record of the results of that analysis or examination.

/s/ Jeana J. Rodennas
Jeana J. Rodennas
Forensic Scientist

JJR/lja

FILED
Clerk of Circuit Court
City of Alexandria, VA

CIRCUIT COURT
CITY OF ALEXANDRIA, VIRGINIA

[SEAL] ORIGINAL

Commonwealth of Virginia
Department of Criminal Justice Services
DIVISION OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

May 19, 2005
(Filed May 24, 2005)

Northern Laboratory
9797 Braddock Road
Suite 200
Fairfax, VA 22032
Tel. No.: (703) 764-4600
Fax: (703) 764-4633

TO: **CHRISTOPHER FLOOD**
ALEXANDRIA POLICE DEPARTMENT
2003 MILL ROAD
ALEXANDRIA, VA 22314

FS Lab # N05-1478

Your Case #: 05-106840
Victim(s): ---
Suspect(s): POOLE, Sophia

Evidence Submitted By: Christopher Flood
Date Received 02/16/2005

Item 2 Sealed packaging containing one plastic bag containing off-white chunky solid material

Item 3 Sealed packaging containing one plastic bag containing off-white chunky solid material

Item 4 Sealed packaging containing one plastic bag containing off-white chunky solid material

Item 5 Sealed packaging containing one plastic bag containing off-white chunky solid material

RESULTS:

Item 2 Cocaine (Schedule II), 5.134 grams of solid material.

Item 3 Cocaine (Schedule II), 0.841 grams of solid material.

Item 4 Cocaine (Schedule II), 12.912 grams of solid material.

Item 5 Cocaine (Schedule II), 15.118 grams of solid material.

Attest:

I certify that I performed the above analysis or examination as an employee of the Division of Forensic Science and that the above is an accurate record of the results of that analysis or examination.

/s/ Jeana J. Rodennas
Jeana J. Rodennas
Forensic Scientist

JJR/lja

FILED
Clerk of Circuit Court
City of Alexandria, VA

[Amended Grand Jury Indictment (Briscoe)]

VIRGINIA CF05000189

IN THE CIRCUIT COURT OF
THE CITY OF ALEXANDRIA

May 2, 2005 [as amended, June 16, 2005]

THE GRAND JURY CHARGES THAT:

COUNT 1

On or about the 10th day of February, 2005, in the City of Alexandria, Virginia, MARK A BRISCOE did unlawfully and feloniously possess with intent to distribute cocaine, a schedule II controlled substance.

VIRGINIA CODE § 18.2-248(C)

VCC NAR3043F9

COUNT 2

On or [between] about [the 20th day of January, 2005 and] the 10th day of February, 2005, in the City of Alexandria, Virginia, MARK A BRISCOE did unlawfully and feloniously transport into the Commonwealth of Virginia by any means, and with the intent to sell and distribute, one ounce or more of cocaine, cocoa leaves, or any salt, compound, derivative, or preparation thereof.

VIRGINIA CODE § 18.2-248.01

VCC NAR3065F9

COUNT 3

On or between the 1st day of August, 2004, and the 10th day of February, 2005, in the City of Alexandria, Virginia, MARK A BRISCOE did unlawfully and feloniously conspire, confederate, and combine with another to distribute cocaine.

VIRGINIA CODE §§ 18.2-248; 18.2-256

VCC NAR3036C9

WITNESS: C Flood, APD

/s/ [Illegible]
FOREMAN

A TRUE BILL

Excerpts from Trial Proceedings (Briscoe)

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

VS.

MARK BRISCOE,

DEFENDANT.

Alexandria, Virginia

Thursday,
June 16, 2005

(Filed Jun. 27, 2006)

The trial commenced at 11:15 o'clock a.m.

BEFORE:

THE HONORABLE LISA B. KEMLER, JUDGE.

APPEARANCES:

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I-N-D-E-X

OPENING STATEMENT	PAGE
ON BEHALF OF THE COMMONWEALTH	12
ON BEHALF OF THE DEFENDANT	13

WITNESS:	DIRECT	CROSS	REDIRECT	RECROSS
GREG LEONARD LADISLAW	14	21	–	–
CHRISTO-PHER FLOOD	22, 71	75	78	–
THOMAS KENNEDY	86	94	–	–
THOMAS RITCHIE	97	107	112	–

EXHIBITS

Number	Description	Identified	Received
COMMONWEALTH			
6A -	Photograph of Defendant's kitchen	28	34
6B -	Photograph of suspected crack cocaine	28	34

6C -	Photograph of suspected crack cocaine	29	34
6D -	Photograph of suspected crack cocaine	29	34
6E -	Photograph of suspected crack cocaine	30	34
6F -	Photograph of suspected crack cocaine	30	34
6G -	Photograph of the kitchen cabinets	31	34
6H -	Photograph of the items in the cabinets	32	34
6I -	Photograph of the electronic scales and razor blade	33	34
6J -	Photograph of the box for electronic scales	33	34
1A -	Suspected crack cocaine recovered from Defendant's pocket	35	85
1B -	Suspected cocaine recovered from Defendant's kitchen	36	85
1C -	Suspected cocaine recovered from Defendant's kitchen countertop	36	85
1D -	Suspected cocaine recovered from Defendant's kitchen sink	36	85
1E -	Suspected cocaine recovered from small plate on the kitchen counter	36	85
7A -	Certificate of analysis	40	71

7B -	Certificate of analysis	40	71
2A -	Digital scales recovered from Defendant's apartment	72	74
2B -	Digital scales recovered from Defendant's apartment	72	74
3A -	Razor blade recovered from Defendant's apartment	72	74
3B -	Plate recovred from Defendant's apartment	72	74
4 -	Box of sandwich bags recovered from Defendant's kitchen cabinet	73	74
5 -	100 gram weight	73	74
8 -	Miranda rights waiver form issued to defendant	99	100

* * *

[13] MS. POLLARD: Officer Ladislaw?

THE CLERK: Office Ladislaw, Courtroom 4. Officer Ladislaw, Courtroom 4.

WHEREUPON,

GREG LEONARD LADISLAW

[14] WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE COMMONWEALTH AND, AFTER HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: Good morning, Your Honor.

DIRECT EXAMINATION

BY MS. POLLARD:

Q Please state your full name for the Court.

A Greg Leonard Ladislaw (phonetic).

Q And Officer Ladislaw, how are you employed?

A I'm a police officer with the City of Alexandria Police Department.

Q And how long have you been so employed?

A Approximately three and half years.

Q And what is your current assignment?

A I'm a community support officer for an area in the city, now know as The Fields of Alexandria, formerly known as Cameron Commons.

Q And where is that located?

A In the 4200 and 4300 block of Duke Street.

Q And directing your attention to February the 10th of 2005, did you have an occasion on that date to assist the Vice/Narcotics Unit in the execution of a [15] search warrant?

A I did.

Q Was that the search warrant of 4261 Duke Street, Apartment B-4?

MS. McGARRITY: Your Honor, I object to all the leading questions.

MS. POLLARD: It's foundational.

THE COURT: All right, I think this is just for a foundation, overruled.

BY MS. POLLARD:

Q 4261 Duke Street, Apartment B-4 for the person of Mark Briscoe?

A I did.

Q And is that residence within the city limits of the City of Alexandria?

A It is.

Q Did you know who Mr. Briscoe was prior to that day?

A I did.

Q And was that as a result of your duties as the neighborhood officer?

A It was.

[16] Q Directing your attention to about 7:30 in the evening, did you meet with Vice/Narcotics Unit officers to discuss the plan for execution of the warrant?

A I did.

Q And following that where did you go?

A I went to [home address omitted] with Officer Lyle (phonetic).

Q Is she another patrol officer?

A She is another community support officer, yes.

Q Were you in uniform?

A I was.

Q Were you displaying your badge with authority?

A I was.

Q Was Officer Lyle in the uniform as well?

A Yes, she was.

Q When you went to that apartment, did you knock on the door?

A I did.

Q Who answered the door?

[17] A Mr. Briscoe.

Q Did he come out into the hall and speak to you?

A He did.

Q While you and Officer Lyle were in the hall speaking to Mr. Briscoe, did the Vice/Narcotics Unit enter the building?

A They did.

Q Did they enter Mr. Briscoe's apartment to execute the warrant?

A They did.

Q During that time, where did you remain?

A In the hallway.

Q With Mr. Briscoe?

A I was.

Q After the Vice/Narcotics Unit was inside the residence, did Detective Flood arrive and did he direct you to search the Defendant?

A He did.

Q And did you conduct that search incident to the search warrant?

A I did.

[18] Q What, if anything, did you recover from the person of Mr. Briscoe?

A I recovered a white rocklike substance, suspected to be crack cocaine from his front right shorts pocket. I also recovered a $50 bill and a $20 bill from his left shorts pocket.

Q What did you do with the white rocklike object that you recovered from the shorts pocket?

A I gave it to Detective Flood.

MS. POLLARD: May I approach the witness, Your Honor?

THE COURT: Yes.

BY MS. POLLARD:

Q Showing you this item that's marked for evidence as Commonwealth's Exhibit 1A and I'm asking you to look into its contents. Does this appear to be similar to the item that you obtained from Mr. Briscoe's pocket?

A It does.

Q When you recovered it, was it packaged in any way?

A It was wrapped in cellophane or plastic.

[19] Q And where were you when you recovered it from his pocket?

A In the hallway.

Q Just outside his apartment on the landing?

A Yes.

Q And where were you when you turned it over to Detective Flood?

A Same location.

Q Between the time you recovered it from the Defendant's person and the time you turned it over to Detective Flood, did you add anything to it, take anything away from it, or alter it in any way?

A I did not.

* * *

[22] MS. POLLARD: Detective Christopher Flood.

THE CLERK: Christopher Flood, Courtroom 4. Christopher Flood, Courtroom 4.

WHEREUPON,

CHRISTOPHER FLOOD

WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE COMMONWEALTH AND, AFTER HAVING BEEN DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. POLLARD:

[23] Q Please state your full name for the Court.

A Christopher Flood.

Q And where are you employed?

A The Alexandria Police Department.

Q And how long have you been so employed?

A 15-1/2 years.

Q And what unit are you assigned to?

A The Vice/Narcotics Unit.

Q Directing your attention to February 10th of this year, did you make arrangements on that day to executive a search warrant that you had obtained for Mark Briscoe's person and his residence?

A Yes.

Q Is that residence located in the City of Alexandria?

A Yes, it is.

Q Did those arrangements involve Officer Ladislaw and Officer Lyle going to Mr. Briscoe's apartment at shortly after 7:30 in the evening?

A Yes.

Q Following the patrol officers going to the location, what group went to that location next?

[24] A The Vice/Narcotics Unit.

Q Were you part of that group?

A Yes.

Q Of the entry team, were you towards the beginning or towards the end of the group of people that entered the residence?

A I was the last person to enter.

Q When you went up the stairs to the landing where the Defendant's apartment was, did you observe the Defendant?

A Yes.

Q Where did you observe the Defendant and what was he doing?

A He was outside his apartment. He was being detained by Officers Ladislaw and Lyle.

Q Did you enter the residence?

A Yes.

Q Was that apartment [home address omitted]?

A Yes.

Q When you entered, who was in the apartment and where were they?

[25] A There was nine other members of the Vice/Narcotics Unit. It's a two-level apartment so there were approximately four detectives upstairs in the two bedrooms. The others were downstairs on the ground level and there were two other people who resided in the apartment inside at that time.

Q Can you describe the two individuals who resided there?

A There was an adult female and I believe a two-year-old girl.

Q And where were they located when you entered?

A They were in the kitchen – well, the adult female was in the kitchen. The child was in the, I guess, the dining room-kitchen area.

Q Was she on the floor or – where was she?

A That I don't recall, I believe she may have been on the floor or on a chair.

Q Were there any other civilians in that apartment at that time?

A No.

Q And was it your search warrant?

[26] A Yes.

Q So when you entered, did you determine when the scene was secured?

A Yes.

Q And following that, did you direct the execution of the search of the residence?

A Yes.

Q And can you describe for the Court what contraband or drugs and paraphernalia you seized and where they were located?

A I seized crack cocaine that was located –

MS. McGARRITY: Your Honor, I object, there is no foundation that this witness has the expertise to actually testify as to the nature of the substances found. We would ask that the testimony be stricken at this point, where he actually testified he found cocaine and we would ask that because of the lack of expertise and the foundation at this point, that the substance referred to be referred to as suspected cocaine or suspected narcotics, Your Honor.

THE COURT: Okay. Well, I'll sustain the objection and ask that you lay a foundation or have [27] him describe it as suspected cocaine until you can have a witness testify about it.

MS. McGARRITY: Thank you.

THE WITNESS: I recovered suspected cocaine in the kitchen, scattered about the kitchen mostly in plain view. I recovered drug paraphernalia that included two scales that appeared to have suspected cocaine residue on them. I recovered a razor blade that appeared to have suspected cocaine residue on it. I recovered a 100 grams weight. I recovered a box with sandwich baggies and I recovered a little plate that had suspected cocaine on it and suspected cocaine residue on it?

BY MS. POLLARD:

Q From what room did you seize these items?

A The kitchen.

* * *

[34] Q Detective Flood, at the scene, did you receive evidence from Officer Ladislaw in the hallway, after he searched Mr. Briscoe?

A Yes.

Q What was that?

A That he had recovered additional suspected crack cocaine from Mr. Briscoe's person.

Q And where did he turn that over to you?

A He turned that over to me outside, in the hallway, where Mr. Briscoe was being detained and searched.

Q Did you place that in a package and seal it?

A Initially, I field-tested [illegible] it was eventually sealed, yes.

[35] Q And did you place that in a heat-sealed plastic evidence envelope?

A Yes.

Q And did you mark on that for evidence?

A Yes.

Q And did you transport it back to the Alexandria Police Department?

A Yes.

Q I'd like to show you what's marked for evidence as Commonwealth's Exhibit 1A and ask you if

this is the item that you received from Officer Ladislaw at the hallway outside of Mr. Briscoe's residence?

(WHEREUPON, THE ITEM REFERRED TO WAS MARKED AS COMMONWEALTH'S EXHIBIT NO. 1A FOR IDENTIFICATION.)

THE WITNESS: Yes, it is.

BY MS. POLLARD:

Q And you're able to recognize your handwriting on that and the identification number?

A Yes.

Q Thank you. And the other [illegible] that you [36] described as suspected cocaine from the kitchen, what did you do with those items?

A I kept them, maintained custody of them, and –

Q Like to – okay.

A I'm sorry –

Q I'd like to show you what's marked for evidence as Commonwealth's Exhibit – have you seen Commonwealth's Exhibits 1B, 1C, 1D, and 1E?

(WHEREUPON, THE ITEMS REFERRED TO WERE MARKED AS COMMONWEALTH'S EXHIBIT NOS. 1B, 1C, 1D, AND 1E FOR IDENTIFICATION.)

THE WITNESS: Yes.

BY MS. POLLARD:

Q Are these the items that you seized in the residence?

A Yes.

Q And Commonwealth's Exhibit 1B, is this the suspected cocaine that you recovered, one of the pieces from the kitchen?

A Yes.

Q Where was this particular item recovered?

[37] A Kitchen sink.

Q Okay, and Commonwealth's Exhibit 1C, where was this item recovered?

A Kitchen countertop.

Q Okay, and Commonwealth's Exhibit 1D, where was this item recovered? I'm sorry.

A That's okay. Kitchen sink.

Q And Commonwealth's Exhibit 1E, where was this recovered?

A A small plate on kitchen counter.

Q And are these the items that are displayed in the photographs that you just looked at?

A Yes.

Q And these items from the – did you place each of these in these heat-sealed envelopes and mark on them for evidence?

A Yes.

Q And did you seal those evidence – those items for evidence?

A Yes, I did.

Q And did you turn them into the police property room?

[38] A Yes.

Q Between the time you recovered these items at the scene and turned them into the police property room, did they ever leave your custody?

A No.

Q Did you ever add anything to them, take anything away from them, or alter them in any way?

A Other than the field-tests on two of the items.

Q Other than that you did not?

A No.

Q And did there come a time when you retrieved each of these items from the police property room?

A Yes.

Q For what purpose?

A To transport them to the state lab.

Q When you picked them up at the police property room, were they still in a locked and sealed condition?

A Yes.

Q Did they appear to have been tampered with?

A No.

[39] Q Did you transport them to the Northern Virginia Forensic Lab?

A Yes, I did.

Q Did you turn them in to an employee of the Division of Forensic Science?

A Yes, I did.

Q Between the time you picked the items up at the police department and the time you turned them in to the lab, did they ever leave your custody?

A No.

Q Did you ever open those items during that transport for any reason?

A No.

Q Your Honor, I move for the admission of Commonwealth's Exhibits 1A, 1B, 1C, 1D, and 1E.

MS. McGARRITY: Your Honor, we would ask that the Court before 42 ruling on that until after

either I can call the other witness at this time or after cross-examination.

THE COURT: I'll just wait till after cross-examination.

MS. McGARRITY: Thank you, Your Honor.

[40] MS. POLLARD: Showing you what are marked for evidence as Commonwealth's Exhibit 7A and 7B, are you familiar with these documents?

(WHEREUPON, THE DOCUMENTS REFERRED TO WERE MARKED AS COMMONWEALTH'S EXHIBIT NO. 7A AND 7B FOR IDENTIFICATION.)

THE WITNESS: Yes.

BY MS. POLLARD:

Q And does Commonwealth's Exhibit 7A correlate with Commonwealth's Exhibit 1A?

A Yes, it does.

Q And how are you able to identify that certificate of analysis and identify it as belonging to this particular piece of evidence, 1A?

A The name on here of Mr. Briscoe is listed here as the suspect, it is our case number, and the forensic lab numbers match.

Q Are those unique to this case and to this piece of evidence?

A Yes.

Q Okay, and directing your attention to Commonwealth's Exhibit 7B, does this piece of evidence [41] correlate with Commonwealth's Exhibits 1B, 1C, 1D, and 1E?

A Yes.

Q And how are you able to identify these – this certificate of analysis and correlate it with these pieces of evidence?

A The same way. The case number from the certificate of analysis matches what's on the heat seals. The name of the suspect matches the name on the heat seals and the forensic lab number matches what was written on the heat seals.

Q And on each of these, do they bear the name Sophia Poole, the lady that was in the kitchen near the substance?

A Yes.

Q And are these numbers and these markings unique to this case and to these pieces of evidence?

A Yes.

Q Thank you.

MS. POLLARD: Your Honor, at this point, I move for the admission of Commonwealth's Exhibits 7A and 7B.

[42] MS. McGARRITY: Your Honor, we object to the admission of Commonwealth's Exhibit 7A and 7B.

THE COURT: Okay –

MS. McGARRITY: Thank you, Your Honor, the Court's indulgence. Your Honor, Exhibits 7A and 7B purport to be lab reports from the Division of Forensic Science. Your Honor, there is a signature on the document under the name – or above the name –

THE COURT: (INTERPOSING) Can I please have the lab sheets there?

SPEAKER: The one above?

THE COURT: Yes. Okay.

MS. McGARRITY: (CONTINUING) – above the name Gina I. Rodinez, the person presumably who signed there purportedly attested that an analysis was performed by him or her on some items that are listed and that the results are an accurate record of the results of the analysis or examination. Your Honor, without Gina Rodinez here as a witness testifying, if these documents were to be admitted, it would be in violation of Mr. Briscoe's confrontation rights under the Sixth Amendment.

[43] Your Honor, in *Crawford v. Washington*, the United States Supreme Court clearly recognized that the right to confront witnesses is not limited to those witnesses who present testimony in court, but any testimonial evidence that is to be presented against

the accused must be subject to the crucible of cross-examination, if the Defendant's confrontation rights, under the Sixth Amendment, are to be preserved.

In Crawford, Your Honor, the court did not identify all possible kinds of evidence that would qualify as testimonial in nature. But the court did, in addressing the definition of that term, quote a definition saying that testimony is typically a solemn declaration or affirmation made for the purpose for establishing or proving some fact. The court goes on and clarifies, giving some examples, that materials such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pre-trial statements that the court would reasonably expect to be used prosecutorily would qualify as testimonial.

[44] Your Honor, this – both of these exhibits are testimonial in nature because they clearly were in – are purportedly – purport to be attestations, solemn declarations, and affirmations to prove or establish some fact. In this case, they seek to establish an element of the offense – of each of the offenses charged against Mr. Briscoe. Your Honor, because they are testimonial, it would be a violation of Mr. Briscoe's confrontation right to admit them.

I would argue preemptively that although Virginia statutes may permit Mr. Briscoe to call as a witness the laboratory scientist, that is not responsive to Mr. Briscoe's constitutional rights. Mr. Briscoe here today is invoking those rights. He has not done

anything to waive those rights under the confrontation clause. And to require that Mr. Briscoe's – that Mr. Briscoe actually subpoena the witness against him would put him in a Catch-22, where he would have to take a substantial risk in bolstering the Commonwealth's case against him by calling one of the witnesses against him himself and perhaps assist the Commonwealth in proving an element of the charges [45] against him.

But beyond that, Your Honor, it would impose an unconstitutional requirement upon Mr. Briscoe to take some affirmative action to preserve his constitutional rights. He has done nothing affirmatively to waive his right and cannot be found to have waived them by default.

Your Honor, I'd also say preemptively that these documents are clearly not merely business records. Your Honor, in discussions of business records, the case law makes clear that business records are such that they are routine and made in the ordinary course of business. An ordinary course of business is understood to exclude those documents that are prepared or records kept for the sole purpose of litigation.

Your Honor, these documents were clearly prepared for the sole purpose of assisting in the prosecution against Mr. Briscoe. Your Honor, the document itself is directed to Christopher Flood at the Alexandria Police Department. It was the police department that the document was prepared for. This

[46] is in response to the police officer, Detective Flood, submitting what was represented to be suspected cocaine to the laboratory for analysis. So the police department took the evidence to a lab, purportedly, and then told the lab in advance what the results were expected to be.

And the lab technician then prepared a report and the Defense has a right to cross-examine that lab technician as to what was examined and what the basis of its findings were. A document prepared for the sole purpose of prosecution is not a business record. If I may just offer an analogy, Your Honor, if birth certificates were prepared not at the time of a person's birth but only when there was some charge against a person involving a status offense, and they were then produced to establish the age of the defendant, clearly they would not qualify – even birth certificates wouldn't qualify as business records.

Any document produced for the sole purpose of enabling a prosecution against an individual, which affirmatively states some fact to prove an element of [47] the offense against that individual, is testimonial in nature, and without being subject to a cross-examination, is barred under the Sixth Amendment Confrontation Clause. Thank you, Your Honor.

MS. POLLARD: Your Honor, it's the Commonwealth's position that Crawford doesn't apply here. First of all, we would that Crawford is actually distinguishable from this case. We would argue that Crawford doesn't apply to the admissibility of

certificates of analysis for three reasons. First, the Defendant's right to cross-examine is protected by statute explicitly. Second, we would argue the results are not testimonial in nature within the meaning of Crawford. And finally we would argue that public policy and principles of stare decisis strongly support the conclusion that Crawford should not apply to exclude such certificates of analysis.

First of all, the reason that Crawford is factually distinguishable and that that's significant is that that factual basis limits the court's holding in Crawford. It was a case where the defendant was tried for assault and for attempted murder. And at [48] trial, the state was allowed to use the recorded statement previously made by the defendant's wife, during police interrogation. She didn't testify at trial because Crawford had invoked his protection of the state's marital privilege law. But the state sought to use her taped statement that – as evidence that the stabbing wasn't in self-defense.

The defendant had argued against it on the grounds that it violated Sixth Amendment right to be confronted with the witnesses against him. And because of the state of the law at that time, which was that the right of confrontation didn't bar admission on a – of an unavailable witness's statement against the defendant. If there was other adequate indicia of reliability, the state was allowed to use it after a balancing test finding that it fit into a firmly ruled exception to the hearsay rule.

The Washington State Supreme Court upheld that conviction, finding the wife's statement reliable because it, you know, it was one of those interlocking statements that fit with the defendant's own confession. Both were ambiguous, though, as to [49] whether the victim had drawn a weapon before the defendant assaulted him. And in overturning the conviction, the United States Supreme Court ultimately overruled the previously existing law of (italics) Ohio versus Roberts and said that the state's use of the wife's statement violated the confrontational clause, where testimonial statements are at issue.

They said the only – the only indicia of a reliability sufficient to satisfy constitutional demands is confrontation. And I think that the facts of that case limit its applicability. We would take the position that – and when you look at this statute and this particular certificate of analysis, the Defendant's right to cross-examine the preparer of the certificate is explicitly protected by statute. That the court of – Virginia Court of Appeals had found, albeit, in an unpublished opinion of (italics) Winfield versus Commonwealth, which is at '97 Virginia, VAPUNP 3000952. The rationale of Winfield is based on firmly established precedent that holds that the accused in any hearing or trial, in which a certificate of analysis is admitted into evidence, [50] shall have the right to call – it cites the statute, pursuant to 19.2-187 and 187.01, shall have the right to call the person performing the certificate of analysis or involved in

the chain of custody as a witness to examine him in the same manner as if he had been called as an adverse witness –

THE COURT: Was that case and the Winfield case decided since Crawford?

MS. POLLARD: No, Your Honor, that's a '97 case.

THE COURT: Okay.

MS. POLLARD: But the constitutional right to confrontation was raised there and disposed off.

THE COURT: Okay.

MS. POLLARD: The –

THE COURT: Is this – does anybody know whether this issue is pending in the Court of Appeals at this time?

MS. McGARRITY: I'm not sure – I know Judge – I don't know about the Court of Appeals, Judge Haddock has addressed this exact issue and found that it was admissible. We would argue also that –

[51] MS. POLLARD: Can I just –

THE COURT: Well, I'm going to let Ms. Pollard finish and then you can reply.

MS. McGARRITY: Okay.

MS. POLLARD: Secondly, we would argue that the results are not testimonial within the meaning of Crawford. It would be the Commonwealth's position that these are scientific results, they are completed by a government employee, pursuant to his or her official duties and this is not the type of hearsay evidence that Crawford had sought to exclude. There it was specifically a statement made by the defendant's wife, who was a witness to the crime, given in response to police interrogation. While a certificate of analysis is prepared with the expectation that it might be used prosecutorily, it is not a statement that is the product of questioning by government agents.

The results bear no resemblance to the inquisitional practices, which the Crawford court was concerned within its opinion. The Virginia courts have long considered certificates of analysis to be [52] documentary evidence and therefore, non-testimonial in nature. A certificate of analysis simply results – documents the results of scientific testing. Justice Scalia noted the distinction between hearsay statements that are testimony – testimonial and those that are non-testimonial in Crawford, when he said most of the hearsay exceptions are covered statements, but by their nature were not testimonial.

For example, business record statements are those in furtherance of a conspiracy. Like business records, statements contained in public records contain facts, which are documentary rather than testimonial in nature. I'm not quoting him anymore.

Laboratory analysis, it is our position, identifying controlled substances have long been admissible as a business record. Your Honor, in (italics) Robertson versus Commonwealth, in 1970, the Supreme Court of Virginia addressed the confrontation issue in the context of the admission of laboratory reports and found that they were admissible.

So it's also our opinion that public policy and the principles of stare decisis strongly support [53] the conclusion that Crawford should not apply to exclude certificates of analysis. I'd be happy to provide a memorandum to the Court, if the Court is going to take this matter under serious consideration. It's our position that it's been taken up by Judge Haddock in this jurisdiction, that there is some indication of a practice that we can adhere to and that –

THE COURT: Do you know how he ruled in terms of whether or not he ruled that these were – and did he rule strictly on the statute and that the statute provides that certificate of analysis are admissible?

MS. POLLARD: I don't know the exact basis of his ruling. It's my – I wasn't in the courtroom when he did it –

THE COURT: Okay.

MS. POLLARD: I know that that – the objection was to a certificate of analysis and he – these Crawford objections were made and that he didn't allow –

THE COURT: Okay.

[54] MS. POLLARD: That's all I know.

MS. McGARRITY: Your Honor, the statute that proffered at Judge Haddock's ruling is not –

THE COURT: Is that your case?

MS. McGARRITY: It's not my case and I don't believe that there is any published opinion so there is no public record as to the rationale. I don't know and apparently Ms. Pollard doesn't know exactly how the issue was presented to Judge Haddock and what the particulars of that were. But as the issue has been presented to this Court, it's clear that these documents should be excluded under Crawford.

Your Honor, the Commonwealth has said a number of times in argument that Crawford is distinguishable. The fact that Crawford dealt with pre-trial statements by a wife to a police officer is not relevant. The particular fact pattern is irrelevant. What's relevant is whether or not the evidence seeking to be introduced is testimonial in nature.

And although statements by a witness to a police officer is one form of testimonial statement, [55] the court in Crawford made clear that testimonial statements are not so limited. One example of testimonial statements that the court recognized were affidavits. And Crawford – Scalia goes into great detail about the history of the importance of the confrontation right and how they were trying to protect against trial by affidavit. By trying to introduce these

certificates of analysis into evidence, the Commonwealth is seeking to introduce what are essentially affidavits by a laboratory technician or scientist.

They are affidavits, essentially, and are therefore testimonial. They're also testimonial by the definition that Scalia cites to, which I'll repeat, a solemn declaration or affirmation made for the purpose of establishing or proving some fact. Your Honor, the Commonwealth also argues that they're not testimonial because they're merely scientific results by a government employee acting in the course of her duties. However, Your Honor, this is different from the results that might have been reached in a medical laboratory, where a test were being conducted [56] for medical purposes, as opposed to for purposes of litigation.

The results by a lab technician doing medical tests for medical purposes arguably would be admissible for – because they weren't intended to be used as litigation and the test themselves weren't conducted for that sole purpose. They had an alternative purpose. Here, the only purpose that these results would serve would be to assist the Commonwealth in making a case against Mr. Briscoe.

Your Honor, the only cases the Commonwealth has cited to you, Winfield and Robertson, are both pre-Crawford and therefore, don't address the issue before the Court today. As far as the Commonwealth's citation of Scalia's distinction between testimony and non-testimonial evidence, where business records are

ordinarily regarded as non-testimonial, the Commonwealth has not responded at all to my argument, that these are not business records because they're not performed in the ordinary course of any business, which would mean that they were prepared for some purpose other than the litigation.

[57] That's the only purpose they're prepared for that's why they don't qualify under a business records or public records analysis. Thank you, Your Honor.

THE COURT: Okay. Well, I think I would like to reread Crawford. And obviously, I thought about this issue a little bit. I've never had it presented to me, yet, in court and I need to reread Crawford. Does anybody have a suggestion how to proceed? My thinking is we can – we have another bench trial today. Is that right, on the docket?

MS. POLLARD: Yes, Your Honor, it's on the docket.

THE COURT: Okay.

MS. POLLARD: I think it would be brief.

THE COURT: Brief, famous last words. Is that the only thing we have left other than to set dates, maybe?

MS. POLLARD: Yes, I believe that's true.

THE COURT: Okay. Well, let me ask you this. Do the parties wish to brief this issue for –

MS. POLLARD: I would prefer to –

[58] THE COURT: (INTERPOSING) Okay.

MS. POLLARD: (CONTINUING) – if the Court is inclined to take that into consideration.

THE COURT: Okay. Well, why don't we do that and we can continue this matter until the 30th. And that will give you time to brief it. I won't be here next week but you can brief it and I'll have time to look into it or we can take all the evidence minus, you know, the admission of the certificates of analysis and have that matter under advisement as though it's a motion to strike, almost.

MS. McGARRITY: Your Honor, if I may. I would think it would be unfair to Mr. Briscoe to actually continue the trial. If the Court would want to reserve ruling and take this matter under advisement, then we could complete the trial portion today, and that we would appreciate if the Court would welcome trial briefs, to be able to brief that issue.

MS. POLLARD: Your Honor, I'd be happy to turn in a brief by 1:00 o'clock, this afternoon, if we could perhaps do that and finish the trial today, I – and with the Court's permission, I think that we can – [59] and I don't think that the matter is a complete surprise to either side. I don't think it would be unreasonable to ask for their briefs today.

THE COURT: Okay, and – well, and I'm thinking about – and we can take up the bench – the other bench trial.

MS. POLLARD: I don't think the other bench trial is going to take any time at all.

THE COURT: Okay. Does – do you want to brief the issue as well, in addition to what you've said? I mean you've made a pretty complete argument. Are there other things that you'd want to say in a brief?

MS. McGARRITY: I think it could be a benefit, if the Court – if I was to elaborate and if the Court would welcome that. I would just defer to Your Honor's discretion and –

THE COURT: Okay, well, I'm just thinking ahead. Tomorrow, I have two pretty short matters. First thing in the morning, we could also just – you can brief it and then we could do the trial. I could review it and we could resume the trial tomorrow. No?

* * *

[61] THE COURT: Do you have a copy of Crawford already printed you could hand up to me because otherwise I – I know it's lengthy and I have to print it.

SPEAKER: I do not, I'm sorry.

THE COURT: No? Okay, no problem. No problem, I'll get it.

SPEAKER: Judge, could I submit a memorandum by 1:00 o'clock?

THE COURT: You can submit whatever you want [62] between now and 1:00, okay. No, you can keep it.

(A SHORT RECESS WAS TAKEN.)

* * *

THE COURT: I have reviewed the *Crawford* decision and I have also reviewed the two cases submitted by the Public Defender's Office, the *Nevada* case and the *New York* case. And I have reviewed the Commonwealth's memorandum. And I've also reviewed two other cases that we were able to find that have addressed this particular issue since *Crawford*, and that would be *Commonwealth versus Verde*, V-E-R-D-E, that's a Massachusetts case at 827 NE.2d 701, decided May 19, 2005. And *State of Louisiana versus Cunningham*, decided June 13, 2005 and that is at – I just have the Lexis number, 2005 Louisiana Lexis 1851.

[64] Based on my review, although I think – first, let me just state this, that I'm going to overrule the objection, but I would just say this so that everybody at least knows my thinking. Obviously, statutes are presumed to be constitutional and any doubt must be resolved in favor of the statute's constitutionality. That's not to say that Virginia Code Section 19.2-187.1 could not be deemed - could be deemed unconstitutional in light of the Supreme Court ruling in *Crawford*, but I find that it's not.

The difficulty, obviously for the Court, and I think for anybody that has to deal with this issue is that the Supreme Court, although *Crawford* goes on for a zillion pages and there's a lot of interesting historical analysis in the end, the Court does not provide a comprehensive definition of the term "testimonial" and that does present a problem, obviously, for this Court and any Trial Court that has to look at this issue.

But I think that the discussion in the Massachusetts case that I found actually has the best discussion and was most persuasive to me. The statute [65] at issue – that case also was a drug case and the Commonwealth of Massachusetts sought to introduce two certificates of analysis showing the weight of the cocaine in the case. And in that case, there was a statute, similar to a statute here in Virginia, that permitted the certificate of analysis to come into evidence and be *prima facie* evidence, although requirements have been complied with.

Interestingly enough, in that statute, at least as reported in the case, doesn't seem to indicate that the Defendant could call the preparer of the certificate as an adverse witness, but in that case the Court discussed the *Crawford* decision at great length and because the issue was whether or not in light of *Crawford*, the certificate of analysis was testimonial and could not be admitted without the witness. And in finding that *Crawford* did not apply to this type of evidence, the Court discussed *Crawford* and noted that, *in dictum*, that the Court discussed that a

business or official record would not be subject to its holding as that type of exception to the hearsay rule was well established.

[66] The Court, in discussing the purposes of a certificate of analysis, stated that certificates of chemical analysis are neither discretionary nor based on opinion, rather, they merely state the results of a well-recognized scientific test, determining the composition and quantity of the substance. Additionally, certificates of analysis are only admissible as *prima facie* evidence of the composition, quality and weight of the substance which the Defendant may rebut if he doubts its correctness. And in this particular case, the Defendant did called his own expert.

And so the Court found that these certificates fall within the public records exception to the confrontation clause. And then the Court went on to discuss that it believed that the admission of these certificates do not implicate the "principal evil at which the confrontation clause was directed, particularly its use of *ex parte* examinations as evidence against the accused." And then the Court analogize the certificate of analysis to a business record and stated that it "is akin to a business or [67] official record, and therefore is not testimonial in nature."

And the only other case that I thought was kind of interesting was the – and also, I would just point out – let me back up a minute, that the Massachusetts case in footnote 4 lists other jurisdictions that have confronted this issue and reached a similar

conclusion and I'm not going to cite all those cases, but there's a number of cases cited. And those are cases decided since *Crawford*. They do note that there are two contrary decisions and those are the *Las Vegas* decision and the *New York* decision. That's *Las Vegas v. Walsh* and *People v. Rogers*.

And there's no question that those cases do support the contrary position advocated by the defense in this case.

Finally, there's this case that I mentioned of *Louisiana versus Cunningham*. In that case, it's kind of interesting because the statute was very similar to our statute. However, the statute provided that once the defense was on notice that the State intended to introduce the certificate of analysis, if [68] the defense subpoenaed the preparer of the certificate at least five days before trial, then the certificate would not be admissible and the Commonwealth or the State would have to call the witness. And so I think that probably, because of that that really head on addressed the issue of the shifting of the burden of proof.

In this case, our statute provides that the defense shall have a right to call the witness or the preparer of the certificate and call that person as an adverse witness at the expense of the Commonwealth and I think having the right to essentially cross examine the witness is what saves the Virginia statute. And so for these reasons, I'll overrule the objection.

MS. McGARRITY: Based on the Court's ruling, for the record, I'd like to make an additional objection, in light of the Court's analysis regarding this statute, if the Court could permit that.

Your Honor, 19.2-187.1 gives the Defendant a right to call the person performing the analysis as a witness. However, that statutory right to call the lab scientist in the defense case doesn't satisfy the [69] constitutional right to confront the Commonwealth's witnesses in the Commonwealth's case. Constitutional rights, Your Honor, have to affirmatively, explicitly, knowingly and voluntarily waived. And until trial, Defendant did not know whether or not the Commonwealth would call that witness in its own case.

The defense was not given notice that this person would not be here and that we therefore would have the burden to call. Furthermore, Your Honor, there's no burden on the Defendant to call any witnesses, to produce any evidence, to present any case.

The admission of the certificate on the grounds that 19.2-187.1 gives the Defendant a right to call the lab scientist as a witness, shifts the burden on to the Defendant to produce evidence and present a case which we would maintain is also unconstitutional burden shifting.

Thank you, Your Honor.

THE COURT: Okay, thank you. That additional objection is on the record.

MS. McGARRITY: We put in on the record for [70] the Court to rule on the objection so as to preserve it.

THE COURT: Well, I'm going to overrule the objection. I think it was encapsulated in my previous statements that I think the fact that the Defendant has the right to call the preparer of the certificate as an adverse witness protects the Defendant's rights.

I mean the certificate comes in as *prima facie* evidence. I mean if the Defendant wants to rebut it, it can. So for the reasons that I stated and tried to articulate as best I could in the short amount of time I had, the objection is overruled.

MS. POLLARD: Your Honor, I ask the last witness to resume the witness stand, if I might.

THE COURT: Okay.

MS. POLLARD: Your Honor, just to be clear, I think the Commonwealth's exhibits 1A through 1E were moved in, but the Court took them under advisement until cross examination and then the certificates of analysis I had just moved in and I believe they're in evidence now.

THE COURT: Okay. Over your objection, then [71] the certificates of analysis will be introduced into evidence. That's Commonwealth's Exhibits 7A and 7B. The physical evidence, so to speak – let's see, Exhibit 1A through 1E, I reserved, admitting them until your cross examination.

MS. POLLARD: Thank you, Your Honor.

(WHEREUPON, THE ITEMS REFERRED, PREVIOUSLY MARKED COMMONWEALTH'S EXHIBIT NO. 7A AND COMMONWEALTH'S EXHIBIT 7B, WERE RECEIVED IN EVIDENCE.)

MS. POLLARD: May I approach the witness, Your Honor?

THE COURT: Yes.

DIRECT EXAMINATION (CONTINUED)

BY MS. POLLARD:

Q Detective Flood, the other items that you have referred to and appear in the photographs, did you collect those items and turn them into the Police Property Room as well?

A Yes I did.

Q I show you what is marked Commonwealth's [72] Exhibit 2A and Commonwealth's Exhibit 2B.

(WHEREUPON, THE ITEMS REFERRED TO WERE MARKED AS COMMONWEALTH'S EXHIBIT 2A AND COMMONWEALTH'S EXHIBIT 2B FOR IDENTIFICATION.)

What are those items?

A Digital scales.

Q Are those the scales that you recovered from Mr. Briscoe's apartment on February 10th that appear in the photographs in the kitchen cabinet shelves?

A Yes, they are.

Q And Commonwealth's Exhibit 3A and 3B, what are these?

(WHEREUPON, THE ITEMS REFERRED TO WERE MARKED AS COMMONWEALTH'S EXHIBIT 3A AND COMMONWEALTH'S EXHIBIT 3B FOR IDENTIFICATION.)

A 3A is the razor blade that I collected because it appeared to have suspected cocaine residue on it. And 3B was the plate that had what appeared to be a small rock of suspected crack cocaine and cocaine residue on it.

[73] Q And Commonwealth's Exhibit 4, is that – what is that?

(WHEREUPON, THE ITEM REFERRED TO WAS MARKED AS COMMONWEALTH'S EXHIBIT NO. 4 FOR IDENTIFICATION.)

A The Shoppers Value sandwich bags box that was in the photograph in –

Q (INTERPOSING) In the kitchen cabinet?

A Yes, on one of the shelves with the other drug paraphernalia.

Q And Commonwealth's Exhibit 5, what is that?

(WHEREUPON, THE ITEM REFERRED TO WAS MARKED AS COMMONWEALTH'S EXHIBIT NO. 5 FOR IDENTIFICATION.)

A That is the 100 gram weight.

Q And did you collect each of these items, package them and mark on the package for evidence and turn them into the Alexandria Police Property Room?

A Yes.

MS. POLLARD: Your Honor, I move the admission of Commonwealth's Exhibits 2A and 2B, 3A and 3B, 4 and 5.

* * *

[81] THE COURT: Okay. At this time is there an objection to the admission of Commonwealth's Exhibit 1A through 1E?

MS. McGARRITY: Yes, Your Honor. Your Honor, those exhibits, first of all –

THE COURT: (INTERPOSING) You're free to leave the witness stand. If you want to stretch, wait outside.

(THE WITNESS WAS TEMPORARILY EXCUSED.)

MS. McGARRITY: First of all, primarily, Your Honor, those exhibits are being admitted for the [82] purpose of admitting into evidence the contents of those bags.

Your Honor, a proper chain of custody for the contents of those bags has not been established. What appears to be the case from the Officer's testimony is that he transported them back to a laboratory that the bags appear to have been cut open and reheat sealed and a new sticker applied.

Your Honor, to establish a chain of custody, to prove that the contents of the bags are, in fact, the same content as the content that Detective Flood placed in the bags, the Commonwealth would need additional evidence of someone on the receiving end from the laboratory to testify that the items that were taken from the bag at that time and replaced in the bag subsequent to being removed were, in fact, identical to the items received by Detective Flood. Absent that evidence, Your Honor, there's no proper chain of custody.

I have a secondary objection which would only be relevant if the Court ruled against me on my first objection.

[83] THE COURT: Why don't you go ahead and give it.

MS. McGARRITY: And that is that, Your Honor, the bags themselves bear a label that Detective Flood has testified he completed. That label describes the contents of the bags as cocaine and we would ask the Court to either, if the Court overrules me on my first objection, to require the Commonwealth to insert the words "suspected" in front of cocaine, because there's no evidence as to the foundation for Detective Flood's conclusion that it is cocaine or to redact that aspect of the label, declaring the contents to be cocaine.

Further, Your Honor, there's no evidence really what the source was of the notation "cocaine" and it could very well be hearsay and I object to it on those grounds as well. Thank you.

THE COURT: Your objection is overruled because that's what he wrote on the bag. I'm not going to change it. That's what he wrote on the bag. All right, the question is whether the Commonwealth can prove today that the substance in the bag is [84] cocaine. So that's what he wrote on the label that he affixed to the bag.

MS. McGARRITY: Our objection, Your Honor, is allowing into evidence the Detective's conclusion which he apparently reduced to writing.

THE COURT: Well, I don't accept it that his writing "cocaine" on the label on the bag that he

put the substance in proof that what's in the bag is cocaine.

His testimony today is what I'm relying on and whatever other evidence the Commonwealth has. So on that ground, your objection is overruled.

MS. POLLARD: Your Honor, if I might respond. 19.2-187.01 allows that the certificate of analysis is evidence of the chain of custody of the material described therein when it was delivered to the Division of Forensic Science as there was testimony that he did deliver it to an employee of the Division of Forensic Science.

THE COURT: Okay.

MS. McGARRITY: Your Honor, it's my understanding that the statute refers to a chain of [85] custody that traces to the substance that is subjected to analysis and what's being called into question today is the physical evidence that the Detective now has in bags. I don't think the statute applies to physical evidence that is released from the lab. It applies to what was subjected to analysis at the time of the testing.

THE COURT: Okay, well, the way the statute reads is that "shall be *prima facie* evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination."

So I think it covers both the transporting to and the transporting away from the lab. So the objection is overruled.

And Commonwealth Exhibits 1A through 1E will be admitted.

(WHEREUPON, THE ITEMS REFERRED TO, PREVIOUSLY MARKED COMMONWEALTH'S EXHIBIT NO. 1A THROUGH COMMONWEALTH'S [86] EXHIBIT 1E, WERE RECEIVED IN EVIDENCE.)

MS. POLLARD: Call Detective Thomas Kennedy.

WHEREUPON

DET. THOMAS KENNEDY

WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE COMMONWEALTH AND, AFTER HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. POLLARD:

* * *

[92] Q What are the small, individual units that are resold commonly on the street?

A $10 rocks, $20 rocks.

Q What size, what weight are those generally?

A Point tenth of a gram or .2 of a gram.

Q And what about a 68? Is that also a common term – excuse me, a 62. Is that a term that is used for larger amounts?

A Yes, it is. The terminology that they commonly use is a kilogram is a thousand grams, so you'd have a half kilo which is 500 grams down to your quarter kilos which are 125 grams and then half of that is a 62 or a six-deuce.

Q You skipped 250.

A Excuse me, 250 for the quarter kilos.

Q Okay, so 125 would be an eighth, and 62 would be a?

A A sixteenth.

Q Okay, and the items that you see in front of you, are those items that you would normally associate [93] with distribution activity, the scale, the counter weight and the plastic bags?

A Yes, there appear to be two scales here, a counter weight to zero out the scales.

Q What's a counter weight?

A This item right here is typically used when you're measuring items to zero out your scale. This is a true 100 gram – it's stamped on here. You can buy that commercially, but that is –

* * *

Q Thank you. And so those items would be used in the manner that you've described?

A Yes.

Q Okay, and the plastic bags, how would they be utilized, if at all?

A For packaging for street-level distribution.

Q And how could the bags specifically be used? Would it be used in whole or in part?

[94] A Typically, you have a rock in the corner of the bag and then it would be tied.

Q And as to the cocaine that is there before you, the amounts that are in the packages marked 1A through 1E, have you had a chance to look at that and familiarize yourself as to the weight of those?

A Yes, it's approximately 40 grams.

Q And would possession of this amount of cocaine be consistent or inconsistent with personal use?

A It would be inconsistent with personal use.

Q Thank you. That's all the questions I have.

* * *

[97] DET. THOMAS RITCHIE

WAS CALLED AS A WITNESS BY AND ON BEHALF OF THE COMMONWEALTH AND, AFTER HAVING

BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

DIRECT EXAMINATION

BY MS. POLLARD:

* * *

[101] Q And what did he tell you about who the contraband that had been seized from his residence that evening belonged to?

A He said it was his. He said all that shit you guys got out of my house is mine, the coke, the crack, the baggies. It was all mine. Even the stuff you got out of my pocket was mine as well.

Q Did he say anything about the weight of what you had taken from his home?

[102] A He did. I asked him how much he though the coke that we got out of the sink weighed and he said it should have been around 40 grams.

Q Okay, and what did he tell you about where he got it?

A He said it got it from "my man in D.C. two weeks ago." And then he said, "I brought it over here."

Q Now were those his exact words about how it got to Virginia?

A Yes.

Q What did he say exactly?

A When I asked him where the stuff in the house came from he goes "I got that from a man in D.C." I asked him how long ago and he said two weeks ago. I said, "So you got it in D.C.?" And he goes "yeah, I got it in D.C., then I brought it down here."

Q What did he tell you about whether it was crack or powder when he brought it over?

A He said it was hard. I asked him specifically was it powder when you brought it over because he talked about sometimes he buys powder, [103] sometimes he buys crack. He said no, it was hard when I got it.

Q The best you can recall, what were his exact words about that? Did he say "it was already hard when I brought it over"?

A He said it was hard when he got it and when he brought it over from D.C.

Q Okay, what did Mr. Briscoe tell you, if anything, about how he came to be involved in cocaine distribution in Alexandria?

A He said me and my girl moved down here about six months ago trying to get away from all that shit, talking about the environment of drug dealing in D.C. He said we didn't know this place we moved into was full of Section 8. Once we got down here I saw how green all these young dealers were and I saw

how much money there was down here and I just had to step in.

Q And what, if anything, did he tell you about he obtained cocaine, about his suppliers?

A When I asked him where he got his stuff, he said I got three main guys in D.C. I get coke from. There's a guy name Japel. He told me Japel's phone [104] number. He says it's stored under J in my phone. I asked him how much he gets from Japel and he said I always get a quarter from Japel. Originally, I thought he was talking about a quarter of an ounce, but then he elaborated, it's a quarter kilo. I asked him how many times he bought from Japel, he said about 80 times over the last five years. And he said half of those were powder and the other half was already hard, meaning already crack cocaine.

He said his second guy was named Tony Marshall. He said that he had gotten a quarter kilo of cocaine. I'm not sure whether he meant powder or crack then. I didn't elaborate on the question. He said he had gotten a quarter kilo from Tony four or five times during October and December of 2004. He said the third guy was named Carl and he said I always get a 6-2 from Carl, meaning a 62 gram package of coke. He said I normally get one every day or almost every day from Carl.

I said how many times have you gotten a 6-2 from Carl? He said 50, 60, 70, 80 times, pretty much every day or every other day.

[105] I asked him how long ago – when was the last time he had purchased a 6-2 from Carl. He said about two weeks ago which was consistent with the cocaine he brought in to Alexandria.

Q And what, if anything, did Mr. Briscoe tell you about how he makes a profit with the cocaine that he buys?

A Specifically talking about the 6-2s that he buys from Carl, I said what's Carl charge you for a 6-2? He said $1800. I said how much do you make off of it? He said I make about $900.

Q And what, if anything, did Mr. Briscoe tell you about how he sells cocaine in Alexandria?

A I asked him if he was a hand to hand guy, selling dimes or dubs, very small packages of cocaine to smokers. He said basically "I sell 8 balls." He said I got a handful of these little young dealers I hit off here in Cameron Commons. He said they're basically 8 ball every other day kind of guys.

Q And now what does it mean to hit off?

A He's talking about that's how often he serves them or sells them an 8 ball of crack.

[106] Q And how many of those did he tell you he had?

A I asked him if he could name them specifically, he named five. Brandon, Jay, Don, Prince and New York.

Q Did he give you any further details about these individuals?

A He did. He said actually Jay, I hit him off – sell him an 8 ball about every third day. The other guys are every other day. And he said Prince always has a gun on him, so be careful with him. I said how long have you been hitting these guys, how long have you been selling crack cocaine to these guys in that quantity and he said a month or two.

Q Okay, and the person who made these statements to you, do you see him in the courtroom today?

A I do, he's seated left of counsel.

MS. POLLARD: May the record reflect the witness identified the Defendant.

THE COURT: The record will reflect the identification by the witness of the Defendant.

* * *

[113] MS. POLLARD: Commonwealth rests.

THE COURT: All right.

MS. McGARRITY: Court's indulgence.

(PAUSE.)

MS. McGARRITY: Your Honor, the defense moves to strike the evidence on each count of the indictment as insufficient for the conviction on any of the counts charged.

* * *

[151] THE COURT: Okay. Can I see that *McCrary* case? Thank you.

(PAUSE.)

THE COURT: I'm going to hand this back, since this is your copy.

Based on the evidence presented, I find the evidence is sufficient to prove beyond a reasonable doubt that the Defendant possessed with intent to distribute cocaine as charged in Count 1 of the indictment.

And as to Count 2, I find that the evidence is sufficient to prove beyond a reasonable doubt that he transported into the Commonwealth cocaine as charged in Count 2. I do think that *McCrary* case is sufficient. I mean the Court specifically addresses sufficiency of the evidence and in that case, the only evidence that they could address was the Defendant's statement to the Officer that he brought the cocaine from North Carolina into Virginia. And then the cocaine was found in the room. So I think that is very similar to the case herein.

And as to Count 3, I think the evidence [152] falls short as to whether or not there was an agreement proved beyond a reasonable doubt. I just don't think these cases are directly on point when all we have is the Defendant's statement and the cocaine. I just don't think it – I don't think it's sufficient beyond a

reasonable doubt. And so I'll find the Defendant not guilty on Count 3, the conspiracy offense.

We need to set this over for the preparation of a presentence investigation report. I would say the 28th of July or August 4th, whichever one is convenient.

MS. McGARRITY: July 28th, Your Honor.

THE COURT: July 28th, okay. We'll set it – continue this matter until July 28th at 10 o'clock for sentencing.

The Defendant is remanded to the custody of the Sheriff.

(WHEREUPON, AT 4:12 O'CLOCK P.M., THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE CONCLUDED.)

Trial Order (Briscoe)

VIRGINIA:

IN THE CIRCUIT COURT
FOR THE CITY OF ALEXANDRIA

COMMONWEALTH OF VIRGINIA

V

MARK A BRISCOE CF05000189

ORDER

This 16th day of June, 2005, came the Attorney for the Commonwealth and the defendant, MARK A BRISCOE, who stands indicted for three felonies, to-wit: Count 1: Possession with the Intent to Distribute Cocaine, Count 2: Transport Cocaine into the Commonwealth and Count 3: Conspiracy to Distribute Cocaine, was led to the bar in the custody of the Sheriff and came also Teresa McGarrity, his attorney.

Whereupon, the Commonwealth moved the Court to amend Count 2 to read: " . . . on or between the 20th day of January, 2005, and the 10th day of February, 2005 . . . ", which motion was granted over the objection of the defendant.

Whereupon, the accused was arraigned and after private consultation with and being advised by his counsel, pleaded NOT GUILTY to Possession with the Intent to Distribute Cocaine as charged in Count 1 and NOT GUILTY to Transport Cocaine into the Commonwealth of Virginia as charged in Count 2 and

NOT GUILTY to Conspiracy to Distribute Cocaine as charged in Count 3, which plea was tendered by the accused in person. And thereupon, after having been first advised by his attorney and by the Court of his right to trial by jury, the accused knowingly and voluntarily waived trial by a jury and with the concurrence of the Attorney for the Commonwealth and of the Court, here entered of record, the Court proceeded to hear and determine the case without the intervention of a jury, as provided by law, and the Commonwealth's evidence having been heard, counsel for the accused moved to strike the Commonwealth's evidence for reasons stated in the record, which motion was overruled and having heard all of the evidence and argument of counsel, the Court finds the accused GUILTY of Possession with the Intent to Distribute Cocaine as charged in Count 1 and GUILTY of Transport Cocaine into the Commonwealth of Virginia and NOT GUILTY of Conspiracy to Distribute Cocaine as charged in Count 3.

The Court, on motion of the defendant by counsel, before fixing punishment or imposing sentence, directs the Probation Officer of this Court to thoroughly investigate and report to the Court as provided by law, on the 28th day of July, 2005, at 10:00 o'clock a.m., to which date this case is continued.

The Court certifies that at all times during the trial of this case the defendant was personally present and his attorney was likewise personally present and capably represented the defendant.

And the defendant is remanded to jail in the custody of the Sheriff.

/s/ Lisa B Kemler
Lisa B Kemler, Judge

Entered: June 17, 2005

Sentencing Order (Briscoe)

(CF05000189)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF ALEXANDRIA

FEDERAL INFORMATION PROCESSING STANDARDS

CODE: 510

Hearing Date: **August 18, 2005**
Judge: **Lisa B Kemler, Judge**

COMMONWEALTH OF VIRGINIA

v.

MARK A BRISCOE, Defendant

This case came before the Court for sentencing of the defendant, who appeared in person with his attorney, **Teresa McGarrity**. The Commonwealth was represented by **Jennifer Pollard**.

The defendant presented argument in support of his motion to set aside the verdict, which motion was denied.

On **06-16-05** the defendant was found guilty of the following offenses:

CASE NUMBER	OFFENSE DESCRIPTION AND INDICATOR (F/M)	OFFENSE DATE	VA. CODE SECTION
CF05000189	**Possession with the Intent to Distribute Cocaine (F)**	**02-10-05**	**18.2-248(C)**
VCC Code:	**NAR-3043-F9**		
CF05000189	**Transport Cocaine into the Commonwealth of Virginia (F)**	**02-10-05**	**18.2-248.01**
VCC Code:	**NAR-3065-F9**		

The presentence report was considered and is ordered filed as a part of the record in this case in accordance with the provisions of Code § 19.2-299.

Pursuant to the provisions of Code § 19.2-298.01, the Court has considered and reviewed the applicable discretionary sentencing guidelines and the guidelines worksheets. The sentencing guidelines worksheets and the written explanation of any departure from the guidelines are ordered filed as a part of the record in this case.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration with the **Virginia Department of Corrections** for the term of: **15 years** for **Possession with the Intent to Distribute Cocaine**, and **5 years** for **Transport Cocaine into the Commonwealth of Virginia**. The total sentence imposed is **20 years**.

These sentences shall run **consecutive with one another and consecutive** with any other sentences imposed.

The Court **SUSPENDS all but 2 years and 8 months** of the **Possession with the Intent to Distribute Cocaine** sentence and **all but 3 years** of the **Transport Cocaine into the Commonwealth of Virginia** sentence, for a period of **15 years**, for a total suspension of **all but 5 years and 8 months**, upon the following condition(s):

Good behavior. The defendant shall be of good behavior for **15 years** from the defendant's release from confinement.

Substance Abuse Screening. The Defendant shall complete any substance abuse screening, assessment, testing and treatment as directed by the Department of Corrections. The Defendant may be subject to payment of any fees associated with substance abuse treatment or intervention as required by the treatment or intervention program on an ability to pay basis.

Supervised probation. The defendant is placed on probation to commence on his release from incarceration, under the supervision of a Probation Officer for **5 years** or unless sooner released by the court. The defendant shall comply with all the rules and requirements set by the Probation Officer. Probation shall include substance abuse counseling and/or testing as prescribed by the Probation Officer.

Appeal Rights. The defendant was advised of his appeal rights.

Costs. The defendant shall pay costs of **$1122.00 plus attorney's fees**.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

9/6/05 ENTER: /s/ Lisa B. Kemler
DATE

One-Judge Opinion of the Court of Appeals of Virginia (Briscoe)

VIRGINIA:

In the Court of Appeals of Virginia on Thursday *the* 18th *day of* January, 2007.

Mark A. Briscoe, Appellant,

against Record No. 1478-06-4
Circuit Court Nos. CF05000189

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Alexandria

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant contends the trial court erred in admitting the certificate of analysis as it violated his Sixth Amendment right of confrontation.

Appellant was charged with possession of cocaine with intent to distribute and transporting cocaine into the Commonwealth with the intent to distribute.[1] During its case in chief, the Commonwealth sought to introduce certificates of analysis performed on the substances found in appellant's apartment and on his

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[1] Appellant was also charged with conspiracy to distribute cocaine but was found not guilty of that charge.

person. Appellant objected, arguing that the certificates were testimonial evidence under *Crawford v. Washington*, 541 U.S. 36 (2004), and, thus, the presence of the individual performing the chemical analysis was required. The trial court overruled appellant's objection and admitted the certificates.

The Confrontation Clause of the Sixth Amendment provides the accused with the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Where testimonial evidence is concerned and the declarant does not appear at trial, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination," *Crawford*, 541 U.S. at 68. Where the declarant "appears for cross-examination at trial," however, the "Confrontation Clause places no constraints at all on the use" of the declarant's prior statements. *Id.* at 59 n.9.

This Court recently held that assuming a certificate of analysis constitutes testimonial evidence under *Crawford*, a defendants confrontation rights are nonetheless protected by the procedures provided by Code §§ 19.2-187 and 19.2-187.1. *Brooks v. Commonwealth*, ___ Va. App. ___, ___, ___ S.E.2d ___, ___, 2006 Va. App. LEXIS 574, at *8 (Dec. 19, 2006). Code § 19.2-187.1 provides the defendant with the "right to call the person performing such analysis or examination" when a certificate of analysis is admitted into evidence. And such "witness shall be summoned and appear at the cost of the Commonwealth." Code § 19.2-187.1.

Code § 19.2-187.1 sets out a "reasonable procedure to be followed in order for a defendant to exercise his right to confront" the preparer of a certificate of analysis. *Brooks*, ___ Va. App. at ___, ___ S.E.2d at ___, 2006 Va. App. LEXIS 574, at *14. Here, appellant did not notify the Commonwealth or the trial court of his desire to confront the witness until the middle of trial. Appellant's "failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses." *Id.*

II. Appellant argues the evidence was insufficient to establish the corpus delicti of the offense of transporting cocaine into the Commonwealth.

On appeal, this Court "review[s] the evidence the 'light most favorable' to the Commonwealth." *Pryor v. Commonwealth*, 48 Va. App. 1, 4, 628 S.E.2d 47, 48 (2006) (quoting *Commonwealth v. Hudson*, 265 Va. 505, 514, 578 S.E.2d 781, 786, (2003)). This principle requires the Court to "'discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences to be drawn therefrom.'" *Id.* (quoting *Parks v. Commonwealth*, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980)).

On February 10, 2005, the police executed a search warrant for appellant's apartment. There, they found a 40-gram rock of cocaine in the kitchen sink, two scales, a razor blade, packaging materials, a plate, and residue throughout the kitchen. The police also recovered cocaine from appellant's pockets. After

appellant's arrest, he told the officers that everything they found in the house "is mine, the coke, the crack, the baggies. It was all mine. Even the stuff you got out of my pocket was mine as well." The rock of cocaine found in the sink "should have been around 40 grams," appellant admitted to the officer. When asked where he got the cocaine, appellant stated that he got it "from my man in D.C. two weeks ago" and then "brought it down here [to Alexandria]." The cocaine "was already hard when I brought it over," appellant continued. Appellant gave the officers the names of the "three main guys in D.C. that I get coke from," contact information, and detailed his prior dealings with them. Appellant confessed that he moved to Alexandria to get away from the drug dealing lifestyle but "saw how green all these young dealers were and I saw how much money there was down here and I just had to step in."

The trial court found appellant guilty of possession of cocaine with intent to distribute and transporting cocaine into the Commonwealth for sale or distribution.

"In every criminal prosecution, the Commonwealth must prove the element of *corpus delicti*, that is, the fact that the crime charged has been actually perpetrated." *Cherrix v. Commonwealth*, 257 Va. 292, 305, 513 S.E.2d 642, 651 (1999). "'It is the body or substance of the crime,'" and "'consists not merely of an objective crime, but of the defendant's agency in the crime.'" *Baughan v. Commonwealth*, 206 Va. 28, 32-33, 141 S.E.2d 750, 754 (1965) (quoting *Lucas v.*

Commonwealth, 201 Va. 599, 603, 112 S.E.2d 915, 918 (1960)).

Where "the commission of the crime has been fully confessed by the accused," however, "only *slight* corroborative evidence is necessary to establish the *corpus delicti*." *Aldridge v. Commonwealth*, 44 Va. App. 618, 650, 606 S.E.2d 539, 555 (2004); *see also Cherrix*, 257 Va. at 305, 513 S.E.2d at 651. There need not be "'independent corroboration of all the contents of the confession, or even of all the elements of the crime.'" *Aldridge*, 44 Va. App. at 650, 606 S.E.2d at 555 (quoting *Watkins v. Commonwealth*, 238 Va. 341, 348, 385 S.E.2d 50, 54 (1989)). For the "confession is itself competent evidence tending to prove the *corpus delicti*, and all that is required of the Commonwealth in such a case is to present evidence of such circumstances as will, when taken in connection with the confession, establish the *corpus delicti* beyond a reasonable doubt." *Watkins*, 238 Va. at 349, 385 S.E.2d at 54. And corroborative facts supporting the *corpus delicti* "may be furnished by circumstantial evidence as readily as by direct evidence." *Aldridge*, 44 Va. App. at 650, 606 S.E.2d at 555; *Watkins*, 238 Va. at 349, 385 S.E.2d at 54.

Appellant confessed to purchasing about 40 grams of cocaine, in "hard" form, from an individual "*in* D.C." and that he, himself, "*brought it down here*" to Alexandria. Appellant confessed to being a drug dealer in Alexandria and claimed ownership of the 40-gram rock of cocaine found in his kitchen sink, the

cocaine found on his person, and all the drug paraphernalia found inside his apartment.

Appellant's confession that he brought the crack from D.C. to Alexandria, along with the evidence seized from his person and his apartment, sufficiently established the *corpus delicti* of the transportation offense.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, the demand shall include a one-page statement identifying specifically how this order is in error.

It is ordered that the Commonwealth recover of the appellant the costs in this Court, which costs shall include a fee of $400 for services rendered by the Public Defender on this appeal, in addition to counsel's necessary direct out-of-pocket expenses, and the costs in the trial court.

This Court's records reflect that the Office of the Public Defender for the City of Alexandria is counsel of record for appellant in this matter.

Costs due the Commonwealth
by appellant in Court of
Appeals of Virginia:

Public Defender	$400.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Marty V.P. Ping
Deputy Clerk

Three-Judge Opinion of the Court of Appeals of Virginia (Briscoe)

VIRGINIA:

In the Court of Appeals of Virginia on Monday *the* 26th *day of* March, 2007.

Mark A. Briscoe, Appellant,

against Record No. 1478-06-4
Circuit Court No. CF05000189

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Alexandria

Before Judge Clements, Senior Judge Annunziata and Retired Judge Jamborsky*

For the reasons previously stated in the order entered by this Court on January 18, 2007, the petition for appeal in this case hereby is denied.

It is ordered that the Commonwealth recover of the appellant an additional fee of $100 for services rendered by the Public Defender on this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. The Commonwealth shall also recover of the appellant the costs reflected in this Court's January 18, 2007 order.

This order shall be certified to the trial court.

---

* Retired Judge Richard J. Jamborsky took part in the consideration of this case by designation pursuant to Code § 17.1-400(D).

Additional costs due the Commonwealth
by appellant in Court of Appeals of Virginia:

Public Defender	$100.00 plus costs and expenses

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ [Illegible]
Deputy Clerk

Certificate of Analysis (Cypress)

[SEAL] ORIGINAL

Commonwealth of Virginia

DEPARTMENT OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

August 29, 2005
(Filed Nov. 28, 2005)

Eastern Laboratory
830 Southampton Road
Suite 400
Norfolk, VA 23510
Tel. No.: (757) 683-8327
Fax: (757) 683-8830

TO: T. COOKE
E. POOLE
DEPARTMENT OF STATE POLICE
1508 TECHNOLOGY DRIVE
SUITE 101
CHESAPEAKE, VA 23320-5951

FS Lab # T05-7773

Your Case #: ---
Victim(s): ---
Suspect(s): BAILEY, Melvin Leon Jr.
CYPRESS, Sheldon Andria

Evidence Submitted By: T. Cooke
Date Received: 07/08/2005

Item 1 One (1) sealed plastic evidence bag containing one (1) knotted plastic bag containing Items 1A and 1B

Item 1A	One (1) knotted plastic bag containing off-white powder chunks
Item 1B	Rice
Item 2	One (1) sealed plastic evidence bag containing one (1) knotted plastic bag containing Items 2A and 2B
Item 2A	One (1) knotted plastic bag containing off-white powder chunks
Item 2B	Rice
Item 3	One (1) sealed plastic evidence bag containing Items 3A and 3B
Item 3A	One (1) knotted plastic bag containing plant material
Item 3B	One (1) knotted plastic bag containing Items 3B1 and 3B2
Item 3B1	Plant Material
Item 3B2	One (1) knotted plastic bag corner containing plant material
Item 4	One (1) sealed plastic evidence bag containing one (1) hand-rolled cigar

RESULTS:

Item 1A	Cocaine Hydrochloride (Schedule II), 27.9 grams.
Item 1B	Not analyzed.
Item 2A	Cocaine Hydrochloride (Schedule II), 32.6 grams.
Item 2B	Not analyzed.

Item 3A Marijuana, 3.8 grams (0.13 ounce).

Item 3B1 Marijuana, 1.1 grams (0.03 ounce).

Item 3B2 Marijuana, 0.9 gram (0.03 ounce).

Item 4 Marijuana.

The results of other requested examinations will be reported separately.

RECEIVED AND FILED

TESTE: /s/ [Illegible]
☑ Deputy Clerk

DATE: 9-6-05

[SEAL] ORIGINAL

Commonwealth of Virginia

DEPARTMENT OF FORENSIC SCIENCE

CERTIFICATE OF ANALYSIS

Department of State Police
FS Lab # T05-7773
Your Case # ---
August 29, 2005

Attest:

I certify that I performed the above analysis or examination as an employee of the Department of Forensic Science and that the above is an accurate record of the results of that analysis or examination.

/s/ Nicole M. Anderson
Nicole M. Anderson
Forensic Scientist

NMA
[PPS]

RECEIVED AND FILED

TESTE: /s/ [Illegible]
☑ Deputy Clerk

DATE: 9-6-05

Grand Jury Indictment (Cypress)

Virginia:

In The Circuit Court
of the City of Chesapeake

December 6, 2005

THE COMMONWEALTH OF VIRGINIA **v.** **SHELDON ANDRIA CYPRESS** **DOB:** 08/26/1980 **Social Security #:** [Social Security number omitted]	**Distribute Cocaine – Second or Subsequent Offense** **Docket Number:** 05-3793 *VCC Number: NAR-3038-F9 (For administrative use only)*

Grand Jury Indictment

The Grand Jurors of the Commonwealth of Virginia and of the City of Chesapeake, attending the Court aforesaid, upon their oaths, present that, in the City of Chesapeake,

SHELDON ANDRIA CYPRESS

On or about the 25th day of June, 2005, did unlawfully, knowingly and intentionally, sell, give, distribute or possess with intent to sell, give or distribute a Schedule II Controlled Substance, namely: Cocaine and having previously committed the offense of Distribution of Possession with the

intent to Distribute, in violation of § 18.2-248(C) of the Code of Virginia (1950) as amended.

Grand Jury Date: December 6, 2005

Grand Jury Witness: **Det. G. Evans**
Chesapeake Police Dept.

A True Bill /s/ [Illegible]
Foreman of the Grand Jury

Not A True Bill /s/
Foreman of the Grand Jury

CERTIFIED TO BE A TRUE COPY
OF THE RECORD IN MY CUSTODY
FAYE W. MITCHELL, CLERK
CIRCUIT COURT, CHESAPEAKE, VA
By: /s/ SS Howard
DEPUTY CLERK

Excerpts from Trial Proceedings (Cypress)

VIRGINIA: IN THE CIRCUIT COURT
OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA	TRIAL
-vs-	CR05003793-00
SHELDON A. CYPRESS,	(Filed
Defendant.	Jul. 31, 2006)

BEFORE: The Honorable S. Bernard Goodwyn,
Judge of the aforesaid Court.

DATE: April 6, 2006.

PLACE: Chesapeake, Virginia.

APPEARANCES:

MS. AMY E. JAMES,
Assistant Commonwealth's Attorney.

MR. THOMAS B. SHUTTLEWORTH,
Counsel for the defendant.

The defendant appearing in person.

Reported by:

Beth B. Chandler, Court Reporter

INDEX

COMMONWEALTH'S WITNESSES	DIRECT	CROSS	RED.	REC.
Hunter, T.	12	17	19	–
Cooke, T.	20	42	49	51
Kennedy, L.	52	55	59	–
Bailey, M.	60	63	–	–
Shearin, B.	68	83	90	92

EXHIBITS

COMMON-WEALTH'S	DESCRIPTION	FOR ID.	REC'D.
1	Digital scale	25	25
2	Suspected marijuana cigarette	26	26
3	Suspected marijuana	27	27
4	Bag containing suspected cocaine and rice	28	28
5	Bag containing suspected cocaine and rice	28	28
6	Form	30	30
7	Certificate of analysis	41	41
8	Certified copy of conviction	42	42

* * *

[8] THE COURT: Okay. Mr. Shuttleworth.

MR. SHUTTLEWORTH: If Your Honor please, when these people were first stopped, both of them were charged. Mr. Bailey has gotten the (inaudible) of the government, and his case has been dismissed. This is a constructive possession case. Without Mr. Bailey's testimony, which Mr. Bailey has come to this epiphany recently and certainly never made any of those statements to the police at the preliminary hearing where his charge was certified to the Circuit Court, never made any of those statements any time up until these charges were dismissed by the Commonwealth.

We are going to try this case on that – that's one of the issues that we're going to try this case on. We are going to have a challenge to Detective [9] Shearin, who I respect beyond question, but as to his ability or anybody's ability to testify as an expert witness on the matters that he's going to testify to as to the fact that an ounce of cocaine is not for personal use and I don't believe – I have a challenge with regards to his testimony.

We also are going to – I have a *Crawford v. Washington* challenge with regards to the drug report, and I'm going to ask the Court not to take into evidence the drug report, because the chemist who tested the drugs is not here and is not – I don't believe that the Commonwealth's planning on calling that person, and I have some law that I'd like to discuss with you and have a bench brief, and I can certainly share with the Court at the appropriate time.

Mr. Cypress denies vehemently the charges against him, and I think, at the very least, this case goes off on a reasonable doubt analysis.

THE COURT: All right. Call your first witness, Commonwealth.

MS. JAMES: Trooper Cooke.

MR. SHUTTLEWORTH: Could I move for separation of the witnesses?

THE COURT: If you would like.

MR. SHUTTLEWORTH: Please.

* * *

[20] *T. COOKE*, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. JAMES:

Q State your name, please.

A Trooper Cooke, Virginia State Police.

Q How do you spell your last name?

A C-o-o-k-e.

Q Were you so employed with the Virginia State Police on June 25, 2005?

A Yes, I was.

Q On that date, did you come into contact with Sheldon Cypress?

A Yes, I did.

Q Do you see him here today?

A Yes, I do.

MS. JAMES: Your Honor, may the record reflect he just pointed to the defendant?

THE COURT: Okay.

BY MS. JAMES:

Q Was your contact here in the city of [21] Chesapeake?

A Yes, it was.

Q Where specifically?

A I-664 southbound, approximately a quarter mile north of Route 13, Military Highway.

Q What brought you into contact with Mr. Cypress?

A I stopped the vehicle for dark window tint. It was driven by Mr. Bailey.

Q Is that person here today?

A Yes, he is.

Q Tell the Court what happened after you stopped the vehicle.

A I had advised the driver, Mr. Bailey, why I stopped him. I checked his window tint and found that it was 33 percent visibility through the front window. I had advised him that was too dark for Virginia standards.

I then had the driver, Mr. Bailey, come back to my vehicle, where I questioned him. After questioning a little bit, I gave him a warning on the window tint knowledge and told him he was free to go.

Q Did you ultimately ask for consent to search the vehicle?

A Yes, I did. As he was getting out of the vehicle, I stated – I said, Excuse me, Mr. Bailey, could [22] I talk with you for a minute? At that time, Mr. Bailey got back and said, Sure – got back inside my vehicle.

Q And did he, in fact, give you consent to search the vehicle?

A Yes, he did.

Q Okay. Was Mr. Bailey back at your car when this conversation was going on?

A Yes.

Q And where – during that time period, from the initial stop until you received consent to search, where was the defendant, Mr. Cypress?

A He was still in the car.

Q In your car or in the car that had been stopped?

A Mr. Cypress was still in the car that I had stopped.

Q And where was he riding in that car when you first stopped it?

A Front passenger seat.

Q Okay. Did he remain in the front passenger seat until you went up to the vehicle to search it?

A Yes.

Q Did you get him out of the vehicle to search it?

A Yes, I did.

[23] Q Where did you have him go?

A I had him walk back towards my vehicle, where there was another trooper waiting at the (inaudible).

Q Tell the Court about the search of the vehicle.

A I first started my search at the passenger floor board, where I saw a suspected marijuana cigarette in plain view. At that time, both the driver and the passenger were placed in investigative custody.

Q Was there any smell of marijuana about the vehicle?

A I don't recall. I don't think so.

Q Okay. And after you found the marijuana cigarette, what did you do?

A I had asked if there was any more marijuana inside the vehicle. Mr. Cypress stated that he had some marijuana in the car. I asked him where it was. He said, In my bookbag. I went back to the vehicle to continue searching.

On the back seat was a bookbag that Mr. Cypress was talking about, and inside of it was a credit card on a key chain that had Mr. Cypress' name on it. Inside, also, was two small baggies of suspected marijuana, a digital scale, and a case with a playing card inside of it, several empty plastic sandwich bags, cell [24] phone, and several grains of rice.

Q What else did you find in the vehicle?

A I continued – I searched underneath the passenger seat. I found a plastic bag with rice that contained a chunky white substance that I believed at the time was crack cocaine. Also, underneath the driver's seat was another bag containing the same substance.

Q Did you ultimately place Mr. Cypress under arrest?

A Yes, I did.

Q Did you recover anything from his person?

A Yes, I did.

Q What did he have on his person?

A He had approximately $383 in U.S. currency, 293 that was in his front pocket and $90 in his back pocket.

Q Did you search Mr. Bailey?

A Yes.

Q Did he have any cash or any items on his person at all?

A I don't have anything on here. I think he had a dollar or $2.

Q Okay. Any drug paraphernalia, anything related to illegal narcotics?

A No.

[25] Q Did you find any smoking devices in the vehicle?

A No, I didn't.

Q Do you have the evidence that you collected with you today?

A Yes, I do.

MS. JAMES: May I approach the witness, Your Honor?

THE COURT: Yes.

MR. SHUTTLEWORTH: May I approach?

THE COURT: Sure.

BY MS. JAMES:

Q I'm showing you what appears to be a black pouch with a silver object inside. Can you identify that?

A Yes. That's the digital scale with the playing card inside of it.

MS. JAMES: Judge, I'd ask that that be introduced.

THE COURT: All right. Will be Commonwealth's Exhibit 1.

(The digital scale was marked as Commonwealth's Exhibit Number 1 and received into evidence.)

[26] THE COURT: You said digital scale with what?

THE WITNESS: It has a playing card, like from a deck of cards.

THE COURT: A playing card?

THE WITNESS: Yes, sir.

BY MS. JAMES:

Q I'm showing you what appears to be a brown leafy wrapper cigarette type shape object. What is that?

A That's the suspected marijuana cigarette that was recovered from the passenger side floor board.

MS. JAMES: Judge, I'd ask that this be introduced.

THE COURT: All right. Exhibit 2.

(The suspected marijuana cigarette was marked as Commonwealth's Exhibit Number 2 and received into evidence.)

BY MS. JAMES:

Q I'm showing you what appears to be a greenish-brownish leafy substance. Can you identify that?

A Yes. That's the marijuana from the bookbag.

MS. JAMES: Judge, I'd ask that that be introduced.

[27] THE COURT: All right. Number 3.

(The suspected marijuana was marked as Commonwealth's Exhibit Number 3 and received into evidence.)

BY MS. JAMES:

Q Now, there's two separate bags remaining here. Did you make any notations that would indicate which one came from the passenger seat and which one came from the driver's seat?

A Yes. The one from the passenger seat was recovered first. This is 9:08 p.m. The second one was recovered from the driver's side at 9:10 p.m.

Q The passenger side was recovered first?

A Yes.

Q So this item that I'm holding in my hand is what was recovered from the passenger seat?

A That's correct.

Q Passenger seat came first?

A Yes.

MS. JAMES: Judge, I'd ask that this be introduced.

THE COURT: All right. Number 4.

[28] (The bag containing suspected cocaine and rice was marked as Commonwealth's Exhibit Number 4 and received into evidence.)

BY MS. JAMES:

Q And this final item is the suspected cocaine and the rice that you recovered from under the driver's seat?

A Correct.

Q And just for the record, Commonwealth's Exhibit 4 also has rice grains in it; is that correct?

A Yes.

MS. JAMES: I'd ask that that be introduced, Judge.

THE COURT: All right.

(The bag containing suspected cocaine and rice was marked as Commonwealth's Exhibit Number 5 and received into evidence.)

BY MS. JAMES:

Q What did you do with all of that evidence that was just introduced from the time you recovered it?

A I kept it in my possession, placed it in clear evidence bags, transported it to Area 47 Office, where it [29] was placed in temporary storage. I later placed it in a permanent locker and then transported from the permanent locker by me to the Norfolk lab, where it was analyzed.

Q And you had a key to the locker?

A No. I do not have a key.

Q Once you put it in the locker, who else has access?

A The evidence custodian.

Q Does anyone transport to the lab, other than you?

A No.

Q Okay. From the time you recovered the items until you stored them in the evidence locker and went

to retrieve them, when you went to retrieve them to take them to the lab, did they appear to be in the exact condition that you had left them in the locker?

A Yes, they did. They were still sealed with my initials on them.

Q And when you took them to the lab, do you have the information as to who you turned them over to?

A Yes, I do.

Q Is this the sheet that you used to send items to the lab?

A That's correct.

MS. JAMES: Mr. Shuttleworth?

[30] MR. SHUTTLEWORTH: Yes.

BY MS. JAMES:

Q Can you read the name of the person who signed for it?

A Yes. That was Allen Evans. He's one of the workers there. He wrote his name on the bottom section.

MS. JAMES: Judge, I'd ask that this be introduced.

THE COURT: All right.

THE CLERK: Commonwealth's Exhibit Number 6, Your Honor.

(The form was marked as Commonwealth's Exhibit Number 6 and received into evidence.)

BY MS. JAMES:

Q Now, have you received a certificate of analysis on these items?

A Yes, I have.

Q Do you have that in front of you?

A Yes, I do.

Q Item 1A is listed as one knotted bag containing off-white powder chunks –

A That's correct.

[31] Q – on the certificate of analysis; is that correct?

A Yes.

Q Okay. Could you tell the Court what that is in reference to?

A That's in reference to the bag, one of the bags that contains rice and a powdered chunky substance.

Q Okay. Do you know whether that was the passenger or the driver's, or do you need to look at the evidence as it was introduced to make that determination?

A I would need to see the last sheet to Number 6 and the –

Number 1 would be –

Q 1A?

A Yes. That would be from the driver's side.

Q And Item 2A, can you identify that? So 1A would be Commonwealth's Exhibit 5; is that correct?

A Yes, that's correct.

Q And Item 2A?

A That would be the bag that was found underneath the passenger side.

Q Commonwealth's Exhibit 4; is that correct?

A That's correct.

Q Item 3A is listed as one knotted plastic bag containing plant material?

[32] A Yes.

Q Can you tell the Court which piece of evidence that is?

A That would be one of the green leafy substances in the bag containing marijuana.

Q You're referencing Commonwealth's Exhibit 3?

A Yes.

Q And it appears that there are two items within – on the certificate of analysis, Item 3, Item 3A, and 3B, which is broken down into 3B1 and 3B2?

A Yes.

Q All those items are contained within Commonwealth's Exhibit 3?

A Yes, they are.

Q Can you tell the Court what Item 4 is?

A Item 4 is the one sealed evidence bag containing a hand-rolled cigar.

Q It's Commonwealth's Exhibit 2?

A Yes.

Q What's the lab number that was assigned to this evidence?

A It's T05-7773.

MS. JAMES: Judge, at this time, I would move for the introduction of the certificate of analysis.

MR. SHUTTLEWORTH: I'd object on the grounds [33] of hearsay, Your Honor. I think under *Crawford v. Washington*, it's clearly inadmissible without the testimony of the person performing the test, and the lab result – this lab test contains an affidavit regarding the results of the examination, and I have some – I have a brief on it that I'd like to submit at this time.

THE COURT: Okay. Commonwealth, what's your position?

MS. JAMES: Well, Judge, I believe this Court has addressed the Crawford issue before, which is essentially the issue that has been raised, and it's ruled that it does not apply to the certificates of analysis. I was not prepared to address this issue in larger detail, but I do –

THE COURT: Well, I'll give you a chance to brief it before I rule on it.

MR. SHUTTLEWORTH: And I'm happy to let the Court read it before I argue or let her read it before I argue. I don't want to put her in a position to have to listen to me at the same time she's trying to read the brief.

THE COURT: All right. Well –

MR. SHUTTLEWORTH: And I don't mean – I'm sorry.

THE COURT: Go ahead.

[34] MR. SHUTTLEWORTH: I don't mean to belabor it. I have some comments about it. You know, there's the one case that went up to the Court of Appeals, Luginbyhl, which initially the Court of Appeals ruled adverse to my position. That case has been pulled and is not law anymore, and it is sitting in front of the Court of Appeals on an en banc – ready for an en banc hearing.

And I have – Your Honor is probably aware of it. You may not be, but if you're not aware of it, one -- 27

days after the Court ruled on it – I believe it was 27 – yeah – 27 days after the Court ruled on it, the Court granted a petition for rehearing on bond.

And I've called the Court of Appeals, and it's not – it's pending. I mean, it hasn't been re-argued yet. And clearly, in the Luginbyhl case, Judge Benton thought that – not only Judge Benton, but a lot of people and a lot of legal scholars, including Professor Lederer at William & Mary, thinks that an affidavit from a chemist clearly falls into the core class of testimonial statements, which are any statements which were made under circumstances which an objective witness would reasonably believe that a statement would be available for use at a later trial. And in the Luginbyhl case, they were talking about a breath analysis.

In the Seton Hall Law Review, they talk about [35] and actually quote Crawford as saying that there's a core class of testimonial statements which exist, including those statements contained in formalized testimonial material such as affidavits – that's the only one that's of any relevance to this – and statements which were made under clear circumstances that would lead an objective witness to reasonably believe that the statement would be available for use at a later trial.

Clearly, that's what this is. This is an opinion of an expert that I can't cross-examine. It's hearsay. And I would say to Your Honor also that it – I'm not

permitted to examine this witness, and under the – under Daubert, as the Supreme Court has said, vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are traditional appropriate means of attacking shaky but admissible evidence. Confrontation clause is primarily concerned with the use of ex parte affidavits at trial, which is what this is, and it can be argued that a lab report is nothing more than the affidavit of an expert.

So I would object to the admission of that piece of evidence on the grounds of hearsay.

THE COURT: All right.

MR. SHUTTLEWORTH: And to admit it and then go any further to admit that piece of evidence would violate [36] my client's Sixth Amendment rights and violate the confrontation clause of the Constitution of the United States.

MS. JAMES: Judge, I'd respond by saying, obviously, the Commonwealth had no notice. There have been no motions filed. So it's the Commonwealth's position that the defendant should not be allowed to raise this issue at this time without filing the proper motions in front of the Court. So that would be my number one position.

THE COURT: What do you think a proper motion would have been?

MS. JAMES: I think that he would have had to file a motion to suppress the evidence and

allege the constitutional violation, and that has not been done.

THE COURT: Okay. What else do you have to say?

MS. JAMES: Well, Judge, I'm not prepared to address the Crawford argument in detail at this point, again, because I had no notice that it was coming, and if it means that – I would submit it to the Court at this point, you know, without the notice.

As the Court knows, it's a fairly hefty legal issue that the Court has dealt with. I would ask either that the Court continues with the case and keep this issue [37] under advisement or allow us to, you know, resume our trial another day after I've had time to, you know, address this issue, present a brief to the Court on the matter.

THE COURT: Well, there's no way I can read this case and digest it in the middle of a trial. That's for sure. Why didn't you all send us a brief earlier?

MR. SHUTTLEWORTH: Well, Your Honor, I thought about that, and I have a response for that. There's always a concern on the part of the defendant that he might end up in front a jury in Chesapeake on a drug charge, and I think that I wanted my client in jeopardy when I raised this issue.

Clearly, it's an evidentiary issue. Clearly, it's one that is supposed to be raised during the trial, and I just didn't want to – I thought about that, and that

was of some concern. I thought about it so much that, not only in that context, but, you know, there's – I'll – I think that to require me to do that in light of Crawford would make any statutory or rule unconstitutional in light of Crawford.

And I found a case in Illinois which has a statute that requires somebody who's going to challenge that to raise it ahead of time, and the Illinois – this is pre Crawford, but the Illinois case says, This statute [38] is unconstitutional under the confrontation clauses of the United States and the Illinois Constitution. It impermissibly requires a defendant to take a procedural step to secure his confrontation rights or be deemed to have waived them and did not require the waiver of this constitutional right to be a knowing, intelligent, and voluntary act.

So I – what Ms. James raises concerned me enough to do some additional research to see if I had a colorable argument, and I think I do, but not raising it ahead of time, as well as the argument in chief. And let me say, I'm happy to reconvene and have this argument, you know, at another time. I'm okay with that.

THE COURT: All right. Well, I guess the thing to do is to take a short recess and then decide what we're going to do after that.

(A recess was taken.)

THE COURT: All right. Let me give you all my instant analysis of what has been presented to me. The Commonwealth has complied with 19.2-187 of the Virginia Code. The defendant argues that allowing the certificate of analysis into evidence pursuant to Virginia Code Section 19.2-187 would violate the defendant's Sixth [39] Amendment rights, and they cite the case of *Crawford v. Washington*, which was decided in 2004 by the U.S. Supreme Court.

This Court has reviewed the Crawford case, and the Crawford case is a case in which the state court allowed a recorded statement of a wife into evidence at trial because her testimony at trial was barred by marital privilege. The trial court allowed the statement in under the Richards line of cases, based upon a belief that there was a particularized guarantee of truthfulness in the wife's statement.

The Supreme Court in analyzing that case, *Crawford v. Washington*, stated that where testimonial statements are an issue, confrontation is the only indicium of reliability sufficient to satisfy constitutional issues.

In this particular case, this Court overrules the objection which is based upon the Sixth Amendment concerns. This Court finds that the scientific results stated in the certificate of analysis are not testimonial statements as that term is defined or described in *Crawford v. Washington*, by the U.S. Supreme Court.

So the objection is overruled for those stated reasons, and the exception's noted.

MR. SHUTTLEWORTH: And I don't want to belabor [40] the issue but it also prevents me from cross-examining the scientist or the chemist who did the test on issues of chain of custody, which would be an issue that I couldn't cross-examine them on because they're not here, on the issue – and I guess, really, the argument that I – as to the whole matter, the argument that is right out of the Commonwealth's mouth a little bit is they feel the need to have the fingerprint person here to testify, because there's no fingerprints on the document. That fingerprint expert signs the exact same affidavit as the chemist who actually does the test. And my – and I just – and I'll be quiet after this.

THE COURT: That's okay.

MR. SHUTTLEWORTH: The point being is is that the chemist really is in no different position than the fingerprint expert, and the Commonwealth – I don't know how the Commonwealth can separate those. They think they need the fingerprint expert to be able to explain the scientific evidence that is submitted on the exact same sheet as the chemist, but they don't need the chemist here to explain the scientific evidence that's explained in that sheet.

That's an affidavit saying, I did these tests, and they came back cocaine, and I had possession of them, and I got them from the right guy. I mean, there's a

lot [41] of things that could be the grist of cross-examination for that person if they were here.

THE COURT: Right. And I don't dispute that. That's all true, but I don't believe Crawford prevents that, and that's why I gave the ruling that I did.

MR. SHUTTLEWORTH: All right. And I would except to that ruling, and I understand and respectfully except.

THE COURT: Sure. All right. The certificate is admitted.

THE CLERK: Commonwealth's Number 7, Your Honor.

THE COURT: All right.

(The certificate of analysis was marked as Commonwealth's Exhibit Number 7 and received into evidence.)

BY MS. JAMES:

Q Trooper Cooke, can you identify these four sheets of paper? The Commonwealth's primarily concerned with the middle two, but that was how it was returned to our office. Can you identify what that is?

A Yes, I can.

Q What is it?

[42] A It's a certified copy of the prior conviction for possession or sell cocaine for the defendant.

Q And that's his information listed on the back of the conviction for Social Security, date of birth?

A Yes, it is.

MS. JAMES: Judge, I'd ask that this be introduced.

THE COURT: All right. That will be Commonwealth's next exhibit. I believe it is 8.

(The certified copy of conviction was marked as Commonwealth's Exhibit Number 8 and received into evidence.)

BY MS. JAMES:

Q And all this was here in the city of Chesapeake?

A Yes, it was.

MS. JAMES: Okay, Please answer any questions the Court or Mr. Shuttleworth may have.

CROSS-EXAMINATION

Q Trooper, my client didn't make any statements [43] that the cocaine was his, did he?

A No, he didn't.

Q As a matter of fact, both Mr. Cypress and Mr. Bailey denied that the cocaine was theirs, correct?

A Correct.

Q And with specific respect to Mr. Bailey, Mr. Bailey never came to you after he was in lockup with Mr. Cypress and said, Not only is that cocaine not mine, but it's Mr. Cypress'?

A Mr. Bailey made a statement to me at lockup.

Q What did he say?

A He stated to me that all he can tell me was it wasn't in there when he left.

Q He didn't come to you at the preliminary hearing – were you at the preliminary hearing? You testified at the preliminary hearing. That wasn't a trick question. And you testified there that Mr. Cypress wasn't the owner of the car, correct?

A Correct.

Q That he made no statements to you, that he did no acts that were indicative that the cocaine was his, correct?

A Correct.

Q And that he really engaged in no conduct at the time of the arrest that would have indicated the [44] cocaine was his, correct?

A Correct.

Q Okay. You didn't submit to the state lab the bookbag?

A No, I didn't.

Q Had you – did you have the scales that are in evidence? And I don't know the exhibit number, but the scale that is in evidence, was that submitted to the laboratory to have it tested for cocaine?

A No, it wasn't.

Q Was the playing card that was in the scale submitted to the lab for cocaine?

A No.

Q Was any rice that you say you found in the bookbag submitted to the state for analysis?

A No.

Q Did you even take possession of any rice? Could you pull out in the evidence that you have in this case rice that you now say you found in the bookbag?

A No.

Q So that if somebody wanted to compare what you say was rice that you found in the bookbag with the rice that has been put into evidence, it would be an impossibility to do, because you didn't take possession of it?

[45] A Right.

Q Now, with regards to the –

MR. SHUTTLEWORTH: If I could approach, Your Honor?

THE COURT: Sure.

BY MR. SHUTTLEWORTH:

Q With regards to the certificate of analysis, Commonwealth's Exhibit Number 7, with regards to that and Commonwealth's Exhibit Number 6, you dropped the evidence and had it signed for by who?

A Allen Evans.

Q Do you know Allen Evans?

A Yes, I do.

Q Okay. And who prepared – who did the analysis on the evidence that you dropped off? This is a copy. You can look at the original if you want.

A Nicole M. Anderson.

Q Did you ever meet Nicole M. Anderson?

A No, I didn't.

Q Have you ever met her?

A I don't think so.

Q Do you know how the drugs got from Allen Edwards (*sic*) to Nicole Anderson?

A No, I do not.

[46] Q Do you know who else handled them besides or in between Nicole Anderson and Allen Evans?

A The people that signed for it is in the Commonwealth's Exhibit 6, chain of custody.

Q Well, is Nicole Anderson's name on there?

A I can't read some of the signatures on this. So I wouldn't be able to tell.

Q Okay. Well, if you would look at Exhibit Number 7 and see if the signature that appears on Exhibit Number 7 looks anything like any of the signatures that appear on Exhibit Number 6.

MS. JAMES: Judge, I'm going to object to that. I don't think there's a proper foundation.

THE COURT: I'll sustain the objection.

BY MR. SHUTTLEWORTH:

Q You can't identify Nicole Anderson's signature on Exhibit Number 6?

A I'm not an expert in that field.

Q Well, I'm not suggesting – I just – you can't – you can't identify a signature that looks like it says Nicole Anderson. That's just what folks – they look at. I'm not asking as an expert. I'm just asking you as a person.

A This could possibly be her signature right [47] here.

Q You're not sure.

A No, I'm not.

Q Okay. So as you testify here today, you can't – you don't know who handled these exhibits once you dropped them off to Allen Evans?

A Other than what the signatures on here, no. I'm not there. I don't see who –

Q Okay. Fair enough. And there are six signatures on there, a total of six signatures on there, am I right?

A Yes.

Q Okay. Now, how does somebody look at Exhibit Number 6 and match it up to Exhibit Number 7 with regards to the evidence submitted?

A I don't understand what you're saying.

Q Well, in other words, on there, there's four pieces of evidence – not there – on Exhibit Number 6, you have listed, one evidence bag times four. There's four evidence bags that are submitted.

A Okay.

Q Okay. Now, is – Evidence Bag 1 contains how many items? How many items does Evidence Bag 1 contain?

A On here, it says one, and I can explain that to you.

[48] Q Well, wait a minute. On here, you mean on Exhibit 6?

A Yes.

Q Okay. On Exhibit 6, it contains one?

A Correct.

Q All right. How many exhibits does Item 2 contain?

A On here?

Q Uh-huh. How many items as a whole?

A It's the rice and cocaine as a whole on my sheet that I turned in. The lab has separated it and put it as two separate items. They separated the rice from the cocaine. So they list it as – it's part of one, but they break it down into 1A and 1B, being the rice and the cocaine.

Q Okay. Thank you. Do you need Exhibit 6 anymore?

A No.

Q Okay. The bag of supposed cocaine that was found under each one of the seats, neither of them were in plain view, correct?

A Correct.

* * *

[52] *LELAND KENNEDY*, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. JAMES:

Q State your name, please.

A Leland W. Kennedy.

Q How are you employed?

A I'm employed by the Department of Forensic Science, Eastern Laboratory, located in Norfolk, Virginia.

Q Do you have a specific job assignment?

A Yes, I do. I'm a latent print examiner.

* * *

[55] CROSS-EXAMINATION

BY MR. SHUTTLEWORTH:

Q Mr. Kennedy, I gather that you took Items 1A, 1, 1A, 1B, 2, 2A, 2B, 3A, 3B, 3B1, 3B2, and Item 4, as listed on the certificate of analysis, FS lab T05-7773, into your personal possession and handled them?

A That's correct.

Q Okay. And why is it that you didn't test the items that contained the rice and the plant material?

A We are not going to develop fingerprints off of individual grains of rice. Item 2B, again, was rice. We are not going to be able to develop any fingerprints on an individual grain of rice.

Q Right. And I – please, I wasn't being cute [56] with you. I didn't think that. I thought that the rice that – that was submitted in evidence was in a plastic bag, and my question was, why didn't you take the plastic bag – or am I misguided and the plastic bag isn't the way it was submitted?

A I see what you're saying. No. The plastic bag was submitted. What happened was, the drug case goes to the drug examiner first. The drug examiner separates it out into Item 2, 2A, 2B. And for instance, Item 2 is a plastic bag, one knotted plastic bag that contained Items 2A and 2B. 2A would be a knotted plastic bag and 2B would be the rice.

Q Okay. That's the individual rice, and this is –

A Right. And that was repackaged by the drug examiner. The rice separately was repackaged.

Q Okay. So when – what you're saying is then when this white rice was found first, it was intermingled or intermixed with the white rock looking stuff?

A I would assume that's correct.

Q And it was picked out individually and put in that plastic bag?

A By the drug examiner, that's correct.

Q Does your name appear on this document, which was Exhibit Number 6?

[57] A This is a copy of our request for laboratory examination, and this is when it went from the officer that submitted it to our security personnel to the drug examiner.

Q Right. But excuse me. My question was maybe not clear. Is your name – is your signature on there?

A No. My name would appear on the internal transfer sheet.

Q How does Mr. Cypress guarantee the chain of custody in this if you have testified that you touched all this stuff, tested it for fingerprints, and it doesn't appear on Exhibit Number 6, your signature?

A I have a copy of our internal transfer sheet, if you'd like to see that.

Q Sure.

A And my name does appear there on February the 7th.

Q All right. I'm sorry. Help me out, if I'm reading this right. The exhibit, Commonwealth's Exhibit Number 6, Trooper Cooke submitted it, and somebody signed for it?

A Correct. Our security personnel.

Q Allen Evans?

A Correct.

Q Okay. Now – and then –

[58] A Which goes into a storage facility in our security system, and then when the drug examiner wishes to work the case, pulls the case, another person in the security system, Deborah Williams, pulled the case out and transferred it to the drug examiner.

Q Okay. So the fact that it shows that Allen Evans received it, and it doesn't show Allen Evans relinquishing it doesn't surprise you?

A No. It's secured in a security vault.

Q Okay. Who is this person right here?

A That is an individual that works for me by the name of Wayne Bryan. He took it from the drug examiner, put it in our room that we have. It's a latent print evidence room that only he and I and the director have a key to, and he put it in what we call latent print administrative storage, which means that either he or I can pull that case and then work it when we are ready to pull our next case.

Q So he took it on September 1st of 2005, and you tested it in February of 2006?

A That's correct. And then I transferred it back to our security personnel.

MR. SHUTTLEWORTH: I don't have any other questions. Thank you.

* * *

[60] *MELVIN BAILEY*, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * *

[61] BY MS. JAMES:

Q Was Mr. Cypress with you on June 25, 2005, when you were stopped by Trooper Cooke?

A Yes, ma'am.

Q At the time you were stopped, were you aware of anything in the vehicle that was an illegal substance?

A No, ma'am.

Q When you were stopped, did you get out of the vehicle at the request of the trooper?

A Yes, ma'am.

Q Okay. Did you go back to the trooper's vehicle?

A Yes, ma'am.

[62] Q Where did Mr. Cypress remain, or where was he while you were back at the trooper's vehicle?

A The passenger seat.

Q Did you have any drugs or illegal substances in the vehicle that day?

A No, ma'am.

Q Do you use drugs?

A No.

Q Do you deal drugs?

A No.

Q You were ultimately initially charged with possession with intent to distribute; is that correct?

A Yes, ma'am.

Q Okay. Mr. Cypress was also charged?

A Yes.

Q Were you taken down into the booking area together?

A Yes.

Q Did you have an opportunity to talk to Mr. Cypress in the booking area?

A Yes, ma'am.

Q What did you ask him?

A He said he was going to take care of it. He going to tell them who the drugs were.

Q Okay. And whose drugs were they?

[63] A They wasn't mine.

Q Did he tell you whose drugs they were?

A Yeah. He told me they were his.

Q Did he tell you how the bag came to be under the driver's seat?

A He said he placed them there.

Q Did Mr. Cypress ever come forward, to your knowledge, and relay that to the trooper?

A Not to my knowledge.

MS. JAMES: Please answer any questions the Court or Mr. Shuttleworth may have.

* * *

[68] *B. W. SHEARIN*, called as a witness on behalf of the Commonwealth, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. JAMES:

Q State your name, please.

A Detective B. W. Shearin.

Q How are you employed?

A Chesapeake Police Department, special investigations section.

Q How long have you been a police officer with the City of Chesapeake?

A Over seven and-a-half years.

Q And how long have you currently been in your job assignment in special investigations?

A Just about three and-a-half years.

Q What specifically does special investigations actually do here in Chesapeake?

A I'm sorry?

Q What specifically does the special investigations section do?

A Investigate anything from terrorism complaints to narcotics complaints.

* * *

[78] BY MS. JAMES:

Q Detective Shearin, have you had an opportunity to review the certificate of analysis in this case, which is Commonwealth's Exhibit 7, as well as Commonwealth's Exhibits 1 through 5?

A Yes.

Q And you've actually visually inspected each of those items prior to coming in here today?

A The cocaine, yes.

Q Have you also had an opportunity to interview Trooper Cooke with regard to this case?

A Yes.

Q Have you been advised that there were no smoking devices found?

A Yes.

Q Have you been advised that there was a backpack in the back that contained the digital scale and the empty plastic sandwich bags, a cell phone, and several rice grains?

A Yes.

Q Have you also been advised that Mr. Cypress had $293 on his person in his front pocket and $90 in his back pocket?

[79] A Yes, I was.

Q And based upon all those items, have you had an opportunity to form an opinion whether or not this is consistent with personal use?

A I have.

Q What is that opinion?

A It is inconsistent with personal use.

Q Okay. Can you tell the Court the specifics of why it is inconsistent with personal use?

A Yes. First, for the totality of all the circumstances, you have roughly about two – just over two ounces of cocaine, 27.9 grams, which is just right at 28 grams, which is an ounce, in one bag; and then just over an ounce in the other bag. You have

money in different increments. You have the digital scale, the plastic bags.

Q What's magical about the digital scale?

A Well, you're definitely – for a digital scale with this quantity, an ounce is a known quantity that is bought on the street in ounces. To break down – we call it break down – or distribute it to smaller amounts for street sale, you would need a digital scale to do that, to weigh it up so you weigh it correctly so you get your right profits and you don't, you know, shortchange your customers.

Q Okay. What other factors did you take into [80] consideration?

A The 50 plastic bags. There were a few plastic bags with the digital scale in the backpack.

Q What's the significance of those?

A Obviously, they're going to be used for packaging of the substance, the cocaine.

Q Any other items?

A Other than just the weight and what I spoke about before, that was just about it. Obviously, the cell phone. It's not uncommon for people to have cell phones. I operate with a cell phone, but it does go into the fact that on the street, narcotics dealers and users are using communication of cell phones for the transactions.

Q Is there anything unique or special about the certificate of analysis? Item 1A says it's cocaine hydrochloride, and also, Item 2A also says cocaine hydrochloride. Do you typically see the hydrochloride on a certificate of analysis?

A No, ma'am.

Q What is unique about the hydrochloride?

A That's at the – one of the purest states of cocaine. That's probably right off of the kilo wrapper from the source – very pure cocaine.

Q And if someone is going to break it down to sell it, what do they have to do to it? Can somebody take [81] cocaine hydrochloride and take it, smoke it like you would a, quote, unquote, crack rock that you'd find on the street?

A You have to cook it up before you can smoke it. That's going to be used for ingestion – you have to ingest it differently.

Q Okay. What happens if you try to smoke it?

A You're going to have to only use a very, very small portion of this, where on the street, you would – it's called cut or break it down. You would add baking soda or some other regular substance to break it down and actually increase your profits.

Q Does that also dilute the strength of the drug?

A Absolutely, yes.

Q Okay. If you took this cocaine hydrochloride in this state and cut it; i.e., added the baking soda or whatever else you were going to add, how much would that increase the volume?

A You could probably double – make two ounces out of it if you really wanted to. It just depends on what kind of cocaine you want to distribute on the street.

Q And does that determine the price value that's set on the cocaine?

A Yeah. It could.

[82] Q Can you give the Court a cost analysis, financial analysis, with these two amounts of cocaine?

A Sure. The 27.9 grams – since that's the smallest bag, you take that one first. If you were just to have that bag alone, you could roughly break it down if you wanted to use the cutting agents and everything else and make two ounces out of it. You could double your profits because it's only going to cost you between 800 to $1,000 for this one ounce. Obviously, then two ounces would be 1,600 to $2,000. That would be –

Q And that is sold without even breaking it down?

A Without even breaking it down, that's just, you know, doubling and selling it back on the street, because this is very pure cocaine. You could go all the way down to – which is a common street value – is

1/5 grams for powder cocaine on the street, which goes for roughly about $75.

Q Now, is this broken down into powder, quote, unquote, or is this broken down into crack, quote, unquote?

A It just depends on what you want to do with it. Right now, it's in powder form. So if you wanted to keep it powder, you could sell it as a powder. You could cook it up, which you would even get more – you could [83] even add more baking soda, because when you smoke it, it goes to your body faster and has a different effect than if you use it by snorting it.

Q So please continue with the financial analysis.

A So if you just kept it in its powder form, you could double your profits and roughly make, I mean, between 2 to $4,000, just depending on if you broke it all the way down to selling it in just one-gram increments or if you sold it into seven-gram increments, which would be quarter of ounces. I mean, it just depends how you want to break it down. There's a whole different array of how much money you could make.

Q Have you ever seen a user in possession of this much cocaine, particularly in this form?

A No, ma'am.

MS. JAMES: Please answer any questions the Court or Mr. Shuttleworth may have.

CROSS-EXAMINATION

BY MR. SHUTTLEWORTH:

Q Well, you've never seen a user, because when you see somebody with that much cocaine, you don't think they're a user. You think they're a dealer?

[84] A I interview them, and they usually say with that quantity that they're in distribution.

Q Did you know where that $293 Mr. Cypress had in his pocket came from?

A No, sir.

Q Did you know that he's a working man, he's a plumber?

A No, sir.

Q You didn't know that. Okay. And you don't know whether or not that came from his paycheck or not?

A I do not.

Q Okay. What is it about the two – is it your testimony that because the 293 was made up of 10s and 20s and 5s that that somehow proves that he's a cocaine dealer?

A Just adds to the totality of the circumstances with everything.

Q And that's something that you base your opinion on?

A It's a very small portion, yes.

Q And the fact that you've testified that he had a cell phone, that's something you base your opinion on?

A Yes.

Q And you've acknowledged you have a cell phone?

A Yes, sir.

[85] Q So if – would your opinion be the same if he didn't have a cell phone?

A Yes, it would.

Q Would your opinion be the same if he didn't have $293?

A Yes, it would.

Q Okay. Do you know how that $293 is divided – I mean, how – were there any $100 bills in there?

A I don't know, sir.

Q You don't know?

A I don't know.

Q How small would the amount of cocaine have to have been before you would have said that it wasn't for distribution?

A How –

Q How small would the amount of the cocaine under the seat have to have been before you would have reached the opinion that it must have been for personal use?

A I have to evaluate each case independently. I don't have a set amount that is just possession or distribution.

Q I mean, if you found one gram under there, under your view, you could make that into two grams, or you could cut it with something and make it into four [86] grams?

A You could sell .2 grams.

Q Okay.

A You can distribute whatever amounts you'd like to.

Q Do you know where the – do you know where the scales and the card and the marijuana was found in the car?

A In a bookbag.

Q Do you know where the bookbag was?

A I believe it was in the back seat.

Q Okay. And you know that that was in a different location than the cocaine was found?

A I believe it was, yes.

Q Okay. Did you know whether or not the scale was tested for cocaine residue?

A I don't believe it was tested.

Q Would it make any difference to you if there was no cocaine residue on the scale?

A Not necessarily.

Q Is it, in your experience and your opinion, people will use scales to figure out how much marijuana they're buying?

A Only larger quantities of marijuana.

Q Well, if somebody wanted to buy an ounce of [87] marijuana from somebody, how would they determine whether they were getting an ounce or less than an ounce?

A Probably by looking at it. Most marijuana is used by just kind of a feel of it. Maybe some weigh it up to be totally exact on the high purity level of marijuana.

Q Right. Okay. Now, with regards to the card, you don't know whether – do you know whether that was tested?

A The card?

Q Yeah.

A I don't know if that was tested.

Q If it showed that there was no cocaine residue on there, would that have an effect on your opinion?

A It would not.

Q What would have an effect on your opinion?

A A lot of things.

Q Okay. Well, we've talked about the card, the scales, the money, the cell phone, and none of that has an effect. If you could take any of those away – I mean, the card and the scales are not related – on my hypothetical – it's not even a hypothetical in evidence right now – the card and the scales haven't been analyzed. So there's no evidence if there was any cocaine on either one of them. So they don't have anything to do with the cocaine.

[88] MS. JAMES: Judge, I'm going to object to that. I'm not sure that it's a question.

THE COURT: Is that a question?

MR. SHUTTLEWORTH: Yes, it is. It's a poorly worded question, Your Honor.

THE COURT: That's all right. Do you want to try again?

MR. SHUTTLEWORTH: Yes, sir. May I stay seated?

THE COURT: That's fine. Typically, I ask people to stand when they're addressing the Court,

but I don't have a problem with you sitting while you question.

MR. SHUTTLEWORTH: I just have a lot of notes on this particular one.

THE COURT: That's fine.

BY MR. SHUTTLEWORTH:

Q I want you to assume for me that there's no cocaine on the card and there's no cocaine on the scale.

A Okay.

Q Okay. Do you still place some importance on those two items being found in the car, even though there's no cocaine on them?

A More importantly the scales, yes, sir.

Q The fact that there's no cocaine on the scale?

[89] A Yes, sir.

Q Would it change your opinion if Mr. Cypress didn't have any money in his pocket?

A No.

Q Would it change your opinion if he didn't have a cell phone?

A No.

Q And I think I understood you correctly that the cocaine that was found underneath the seat of the

car – seats of the car was in – each of the items of cocaine were in individual, separate packages?

A On the two bags total?

Q Two bags total.

A Yes, sir.

Q Okay. Is there a cutoff on the amount of cocaine that would have had to have been found before you are of the opinion that it's for personal use?

A I just stated that I don't have a certain limit that I go over. I have to evaluate each case independently.

Q Let's, for purposes of this question, treat the smaller bag of cocaine that was found as one ounce.

A Okay.

Q What proportion of that is to – is that one ounce to a kilo of cocaine?

[90] A There's 2.2 pounds in a kilo, 16 ounces in a pound.

Q So it's about 1/40 of a kilo?

A An eighth of a kilo is four and-a-half ounces.

MR. SHUTTLEWORTH: Thank you. I don't have any other questions.

MS. JAMES: One follow-up.

REDIRECT EXAMINATION

BY MS. JAMES:

Q Have you ever reviewed a case that was charged as a distribution or possession with intent to distribute and made a determination that it was not a distribution case?

A Many times, yes.

MS. JAMES: I don't have any other questions.

MR. SHUTTLEWORTH: Your Honor, I'd move to – I'd object to that question and move to strike, because there's a whole bunch of reasons why he might have done it. There might have been a plea bargain. I mean, there might have been other reasons why that was, and I think that question in its – just the question standing alone is – the answer's misleading.

THE COURT: I guess in what way?

[91] MR. SHUTTLEWORTH: Well, we – could you read back the question and the answer, please, Madam Court Reporter?

THE COURT: Have you ever found a case – has there ever been a case where you found that – you're right. Read it back.

MR. SHUTTLEWORTH: I would take your recollection.

THE COURT: But my recollection of the question was, have you ever had a case that you've analyzed and found that the person was not a dealer? But let's see how close I am.

(The last question was read back.)

MR. SHUTTLEWORTH: I would have a further – I would have the objection that I stated. I would have the further objection that that invades the province of the trier of fact as to whether it is or not. If he's made a determination – I guess maybe we could clear it up if I could question him.

THE COURT: Sure.

[92] RECROSS-EXAMINATION

BY MR. SHUTTLEWORTH:

Q When you determine – take a case that you've determined somebody's been charged with possession with intent and it's broken down to simple possession. Are there other things going on? Are you plea bargaining? Is the case being plea bargained? Is the person helping you? Is he out working out on the street for you? Those things go on?

A They do go on, but I've had cases where none of those were going on, and I did – the person was charged with possession with intent to distribute, and I did give an opinion that the facts were more consistent with personal use than distribution.

Q How much cocaine was charged – was involved in that case? Do you remember?

A I don't remember, sir.

THE COURT: Do you still want to strike it?

MR. SHUTTLEWORTH: Pardon?

THE COURT: Is your objection still out there?

MR. SHUTTLEWORTH: Yes, sir. It's still out there, but I'm going to sit down.

THE COURT: Okay. I'll sustain the objection.

All right. Anything else, Commonwealth?

[93] MS. JAMES: No, sir.

THE COURT: Defendant?

MR. SHUTTLEWORTH: No, sir.

THE COURT: All right. Thank you.

MS. JAMES: Just out of curiosity, Judge, why did you sustain the objection for my –

THE COURT: Well, I sustained the objection because, quite honestly, whether or not he's found that in other cases, I don't see that it's terribly relevant to this case one way or another.

MS. JAMES: I was only offering it in terms of dealing with the line of questioning about where

would you draw a cutoff, and don't you always – there was an implication there that he always found distribution, which is the reason I asked the question.

THE COURT: Or was he saying that in this particular case, no matter what I say, you're going to find distribution in my client? You know, so –

MS. JAMES: Just covering my bases, Judge.

THE COURT: I hear you. All right. Anything else?

MS. JAMES: Commonwealth rests.

THE COURT: All right. Defense?

MR. SHUTTLEWORTH: I just have a motion, Your Honor, at this time. I'd renew my motion to the extent [94] it's necessary on the Crawford issue. I don't have anything else to say about it, but I just would renew it at this time. I would also add to that motion the fact that the evidence as put on by the government in this case with regards to the chain of custody is really incomplete based on the testimony of Mr. Kennedy and Officer – or Trooper Cooke, and Exhibit Number 6, if you look at it, there's no way that –

THE COURT: Stop right there. Pursuant to Virginia's law, what evidence do they have to put on concerning chain once they present the certificate in a manner that's consistent with 19.2-187?

MR. SHUTTLEWORTH: Well, I think they have – I think that to give it credibility and the ability to be admitted, they have to prove the chain of custody. I don't think that they've proven the chain of custody until it got to the woman who did the test, which is Nicole Anderson.

I mean, in other words, I don't think them – that the – that the exhibit which is the certificate being put into evidence cures chain of custody. If it turns out on cross – because if it's something that is uncovered under cross-examination, I think the Court could revisit the certificate, and I would ask the Court to do that, and I would ask the Court to consider not counting [95] the certificate as evidence in this case, because I don't think they've proven chain of custody.

I don't know if that answers your question. It doesn't feel like it did.

THE COURT: We're kind of on one accord as far as that's concerned.

MR. SHUTTLEWORTH: But I have to look at that. I can't answer the question that Your Honor posed without looking at that authority that Your Honor cited, but I mean, it seems to me the way a trial runs, they put on evidence, they put in the certificate, and it turns out in cross-examination that they didn't have proper chain of custody. The Court can't ignore that fact, and I think I brought out on cross-examination that they didn't have proper chain of custody.

THE COURT: What was improper about it?

MR. SHUTTLEWORTH: Well, Nicole Anderson – I don't see Nicole Anderson's name on here where she ever came into contact with it. Mr. Kennedy's name's not on here existing in evidence. He's on some other sheet. There's no telling who touched that and who – in between the time that Trooper Cooke dropped it off and Ms. Anderson got it. I think that's what's improper about it.

THE COURT: All right. Commonwealth?

[96] MS. JAMES: Judge, my position is the Commonwealth only has to prove chain of custody insofar as essentially getting it to the lab. Once it's at the lab, the statutory provisions take over, and chain of custody is essentially presumed. The Commonwealth of Virginia would come to a grinding halt but for those statutes, and that's why they're there.

Also, Judge, chain of custody is not an admissibility issue. It's a weight issue.

THE COURT: Is that true?

MS. JAMES: I think in a lot of respects – in a lot of circumstances, it can be, and in this particular one, clearly the issue he's raising is more of a weight objection. We have the trooper saying this is what it looked like. This is when it went to the lab. Here it is. It looks the same to me.

THE COURT: Can there be a weight issue if the issue is whether or not it's cocaine or not? I mean, kind of like a weight issue whether or not somebody's pregnant. I mean, it's like – well, it's a weight issue. I mean –

MS. JAMES: Well, there often are weight issues – and two years later.

THE COURT: In a nonliteral since.

MS. JAMES: No, Judge. Because something – when you're talking about an admissibility of something, [97] that's a bright line determination. It's either cocaine, or it isn't cocaine. If it's not cocaine, you can't proceed with your case. If it is, you can proceed.

So when you're talking about weight, the analogy would be, for example, the substantial compliance statute that's in place for the DUI code sections. That really gives the Commonwealth essentially a weight argument. If something gets lost in transit or something funky – excuse my common terminology – happens along the way, you know, we're still letting this in. It's still admissible. The whole issue – the whole reason for chain of custody is because you want to preserve the integrity of the evidence until it gets analyzed.

In this case, we have it going from the trooper and being taken to the lab, and when he leaves it at the lab, it looks the same way as when he took it off the defendant. There's no reason at this point to

conclude that anything has been done to that to temper with it, to somehow magically slip in a substance that is cocaine hydrochloride and take out some artificial substance that would have caused the defendant to be found not guilty. That's why I'm arguing that it's really a weight issue as opposed to admissibility on the certificate. We've met the burden to get the certificate in.

[98] THE COURT: All right. Mr. Shuttleworth, anything else?

MR. SHUTTLEWORTH: Well, I guess this goes back to my argument about Crawford, which is why the person needs to be here, so that they can be cross-examined. I mean, this points up pretty clearly the wisdom of Crawford as it is applied to out of court affidavits on issues that are used to convict people of crimes, and that's what this is. There's some affidavit that's in front of Your Honor that says this is cocaine.

There are – I have, and I won't – I have a list of – if I can find it – a list of recent times that – recent events where analysts have been crooked, have been incompetent.

MS. JAMES: Judge, I'll object to that line of –

MR. SHUTTLEWORTH: Well, Your Honor can take judicial notice –

THE COURT: Hold on a second. I think my tender ears can stand it. I'll hear it.

MR. SHUTTLEWORTH: In Oklahoma, there was an inquiry focusing on science used by prosecutors that they threw out a bunch of cases. In New York, there were two states – there's in the *New York Times*, two states to review lab work of an expert who erred on IDs. Some [99] officials shaken by new Central Park Jogger inquiry. Remember that case of the Central Park jogger that they screwed up?

Houston's troubled DNA crime lab faces a growing scrutiny. Double blow strikes police in Houston. Ex-FBI biologist falsified DNA reports. Odds of mistaken terrorist arrest – Spain and U.S. at odds on mistaken terrorist arrests. I mean, there's a list, and this is contained in the article about admissibility of lab reports, and the reason – the reason why they shouldn't be admissible, which I've already argued. I'm not going to re-argue. I just got a little farther.

I would also ask the Court to consider, if the Court is persuaded by the Commonwealth that Mr. Cypress has some culpability in the possession of these drugs that, the Court consider my argument that they haven't proven that they were for purposes of distribution and that there was just a simple possession case of cocaine. And I'll rely on the testimony that's been in the case.

THE COURT: Got you.

MR. SHUTTLEWORTH: And I think that's it at this time, Your Honor.

THE COURT: All right. The Court will take the argument made by counsel as a motion to strike the Commonwealth's evidence based upon three different things. [100] One is the violation of the defendant's Sixth Amendment rights concerning confrontation as it relates to the certificate of analysis, which was admitted into evidence by the Court, and the defense bases that argument upon the *Crawford v. Washington* case, decided by the United States Supreme Court in 2004. For the reasons previously stated by the Court, that ground for the motion to strike is denied.

The second motion to strike deals with chain of custody and the argument by defense counsel that the chain of custody is so flawed in this case that the Court should not – or I guess it undermines the indicia of the reliability of the report, or it's so flawed to the point that the Court should not admit into evidence the report. And the Court would overrule that motion to strike based upon its belief that the chain of custody has been satisfied as required by Virginia evidentiary law.

And, you know, a lot of time with this, I don't know how much detail to tell people, because I know, quite honestly, what I say doesn't matter, because the Court of Appeals will do what they think is right when the case gets to them, but I think there's a difference between the analysis you deal with in dealing with something such as chain of custody as opposed to dealing with the confrontation issue that Crawford presents, [101] because chain of custody is a

state evidentiary law, and I believe that the law in the state of Virginia concerning chain of custody does not violate the confrontation clause as outlined in Crawford.

And, you know, I just kind of point out the distinction that, you know, state law can prevent the need to present certain evidence, and that's what chain of custody is about. What evidence do you need to present to the Court in order for the Court to admit certain evidence, as opposed to Crawford, which deals with the form that necessary evidence must take, because in Crawford, it says that you can't admit out of court statements that somebody has not had the opportunity to cross-examine. So that's a long-winded way of telling you I overrule your motion to strike on that grounds.

And then the third motion to strike was based upon an argument the Commonwealth had not presented sufficient evidence for the Court to find the defendant guilty of possession with intent to distribute cocaine and asking the Court, because of that, to reduce the charge to simple possession. The Court would note that on motion to strike, the evidence is viewed in the light most favorable to the Commonwealth, and the Court finds that the Commonwealth has proven a prima facie case of possession with the intent to distribute, and the motion to strike on [102] that grounds is denied, also.

So does the defense have any evidence it wishes to present?

MR. SHUTTLEWORTH: If we could have about a five-minute recess, Your Honor? No more than five minutes.

THE COURT: Sure. That's fine.

(A recess was taken.)

THE COURT: All right. Defendant?

MR. SHUTTLEWORTH: Defendant has no evidence, and the defendant would rest, Your Honor.

THE COURT: All right. I'll hear your arguments, Commonwealth.

MS. JAMES: Judge, with regard to the first issue that the Commonwealth has to establish is possession by the defendant. In this case, we have some unique packaging materials. We have the rice that's located in both these bags, and there's three or four grains of rice that's located in the defendant's bookbag. That's the same bookbag that the defendant had previously indicated was his bookbag that contained marijuana, that has the scale, that has the empty plastic baggies, which the Court knows is for distribution.

[103] Once he acknowledges the marijuana being in that backpack, what's in that backpack is attributed to him, there's no reason for the Court to – the evidence at this point would point the Court to the direction that the rice in that backpack is the same as that rice that is located with the contraband in this case.

Plus, in addition to that, you have Mr. Bailey, who is a first cousin of the defendant and who, without any inducement from the Commonwealth, has come in and testified against his own family member and told the Court, This was not mine. I work at the shipyard, and, you know, he was supposed to come forward. He told me in lockup it was his and that he put the bag under my driver's seat. There's been no evidence that – you know, that's not controverted at this point.

And then the last issue with regard to the distribution factor, you have the testimony of Detective Shearin, and what – there's two things that are unique and extra strong as the evidence is in front of the Court. Number one, the amount of drugs that you have in this case. You have close to 60 grams of cocaine. It's very rare that we have a case with that much cocaine here in the city of Chesapeake.

Second of all is the fact that this is a pure cocaine. This isn't just 60 grams of cocaine. This is [104] cocaine hydrochloride. So it's even stronger than what the Court sees typically. That amount of cocaine, that's thousands of dollars when broken down. That is not something a user is going to be in possession of. It can't even be used basically in the condition that it's in because it's so strong. It really has to be cut with one of the cutting agents to be ingested in one way or another.

Detective Shearin has offered the opinion that it is not consistent with personal use. There are other

things that are relevant to that consideration; the scale for measuring, the plastic baggies that are there for packaging purposes. And when the Court looks at the profit that would be achieved by cutting this cocaine up, it's the Commonwealth's position that it is – and also the lack of smoking devices. I dare say that a vast majority of the possession cases prosecuted in the city of Chesapeake are crack stems or bag residue. We don't have those crack – we don't have a crack stem in this case. We don't have any indication that the defendant is a user. All the evidence in this case is pointing toward distribution.

THE COURT: Defense?

MR. SHUTTLEWORTH: Yes. I would renew all of the arguments that I made without reiterating them, [105] rehashing them. I think Your Honor is capable of being able to remember those. I would also state that at this stage of the game, there's a different standard that applies with regards to the issue of whether it was for distribution or simple possession, and I would just argue that at this stage, with the different burden, that the Court – different standard that the Court has to measure the evidence, I would point out to the Court that, but for Mr. Bailey's testimony, this really is – and Mr. Bailey is charged at the same time and was dismissed in this case.

As I said in opening statement, this is a recent statement that he's made to people after the case against him was dismissed. For whatever reason, I

don't know. I mean, I don't know why he made that statement if the case was dismissed against him. It would seem to me that he wouldn't want to talk to anybody who's in a position of authority for a long time given his circumstances.

But I think that the Court has to take Mr. Bailey's testimony with a grain of salt. And but for Mr. Bailey's testimony, this is a constructive possession case, and the evidence is very clear. Mr. Cypress didn't make any acts, didn't make any statements to the – have any behavior at all that would indicate that that cocaine [106] was his.

The police did no testing of the card or the scales. There's no evidence that there's any cocaine on any of those. So I think you need to discount the Commonwealth's argument with regards to the – I mean, they want to say that those scales were used for cocaine. If they were used for cocaine, why isn't cocaine on them? Why isn't there evidence of that?

I would point out that the police officer – I've got a mental block as to the name – the police officer – Cooke, the trooper – Trooper Cooke testified that it was brown rice that he found in the bookbag. The person who was here from the fingerprint – when he examined it, there's white rice. And I think Your Honor can look – I don't need to rely on what Mr. Kennedy says to prove this. You can look in the bag. There's white rice in there. That's not brown rice in there, and I think there's a little distinction between that, and I think that's persuasive from the

defendant's standpoint. I think that's the substance of the defendant's closing argument.

THE COURT: All right.

MR. SHUTTLEWORTH: No fingerprints on the baggies.

THE COURT: Anything else, Commonwealth?

[107] MS. JAMES: Judge, I would just note that the trooper described it as yellow rice, not brown rice.

MR. SHUTTLEWORTH: You're right. I'm sorry. I stand corrected. I agree with you for the record about that.

THE COURT: All right. Please stand Mr. Cypress.

The Court would – defense renewed its motions to strike. The Court will deny those motions for the reasons previously stated by the Court. Also, the defense – I don't need to recount defenses argument. So the motions to strike are taken care of, and the Court does view the evidence at this point in the procedure with a different standard than applied before. And what the Court has to determine is whether or not the Commonwealth has proven beyond a reasonable doubt each of the elements necessary to find the defendant guilty of possession with intent to distribute cocaine. The Court finds that

the Commonwealth has done so and finds the defendant guilty as charged.

We'll continue this matter for purposes of the preparation of a presentence report prior to sentencing.

* * *

Defense Bench Memorandum (Cypress)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,

v. **CRIMINAL CASE NO.: CR05-3793**

SHELDON A. CYPRESS,

Defendant.

BENCH MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE DRUG REPORT BASED ON VIOLATION OF CRAWFORD V. WASHINGTON

NOW COMES Defendant, Sheldon A. Cypress ("Defendant"), by counsel, and files the following Bench Memorandum in Support of Motion to Exclude Drug Report Based on Violation of *Crawford v. Washington*. The Commonwealth in this case seeks to introduce a laboratory drug report to prove an essential element of its case: that substances recovered from the car in which Defendant was a passenger have been tested and that the tests confirm that the substances contain cocaine and marijuana. Because the Commonwealth, acting through its laboratory, prepared the drug report solely for the purpose of prosecuting Defendant, and because the results of the drug report will be used to establish an element of the Commonwealth's case, the drug report is testimonial hearsay. Since the Commonwealth has established neither the unavailability of the chemist who prepared

the report, nor that Defendant had a prior opportunity to cross examine that witness, admission of the drug report would violate *Crawford*, as well as Defendant's constitutional right under the Sixth Amendment to confront witnesses against him. Accordingly, the court should grant Defendant's motion and exclude admission of the drug report.

BACKGROUND

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The Supreme Court's ruling in *Crawford* essentially overturned the existing interpretation of the Confrontation Clause contained in *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). In *Roberts*, the Court ruled that the Confrontation Clause did not prohibit the admission of an unavailable witness' statements against a criminal defendant provided that the statements contained "adequate indicia of reliability". The reliability standard adopted in *Roberts* could be met in either of two scenarios. The challenged statements must either fall within a "firmly rooted hearsay exception" or contain "particularized guarantees of trustworthiness." *Id.*

Prior to *Crawford*, case law in Virginia held that "a written report offered to prove the results of testing or of an analysis would generally be inadmissable hearsay evidence unless the person who conducted

the testing or prepared the report testified to authenticate the document and verify its contents." *Myrick v. Commonwealth*, 13 Va. App. 333, 337-338 (1991). However, *Myrick* noted that Code §19.2-187 was "enacted to allow into evidence a written drug report of an analysis or examination conducted by specific laboratories, without requiring that technicians be present." *Id.* in other words, Section 19.2-187 created an express exception to the hearsay rule. While drug reports did not implicate the Confrontation Clause because they were viewed as well-recognized exceptions to the hearsay rule, they did require strict compliance with the filing statute because of confrontation clause concerns. *See Wingfield v. Commonwealth*, 1997 Va.App. LEXIS 188 (1997), an unpublished opinion holding that the "rights granted to a defendant under the Confrontation Clause are not violated by admitting into evidence against him the certificate of analysis which falls within a 'firmly rooted' hearsay exception.[1]"

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[1] Even after *Roberts*, some state and federal courts held that admission of laboratory reports violated the Confrontation Clause because they were not sufficiently reliable and because of the clear prejudice worked on criminal defendants deprived of the right to cross-examine the findings and circumstances of such reports. *United States v. Martin*, 984 F.2d 308 (9th Cir. 1993); *Grantham v. State*, 580 So.2d 53 (Ala. Crim. App. 1991); *In Re J.H.*, 581 A.2d 1347 (N.J. Super. App. Div. 1990)

CRAWFORD ABANDONMENT OF ROBERTS' RELIABILITY TEST

In 2004, the United States Supreme Court expressly rejected the core finding and rationale of *Roberts* to the extent that it held that an unavailable witness' out-of-court statements could be admitted without violating the Confrontation Clause so long as the statement had "adequate indicia of reliability." *Crawford v. Washington*, 541 U.S. 36, 42, 158 L.Ed. 2d 177 (2004). After *Crawford*, out of court "testimonial" statements were the central focus of Confrontation Clause cases, not the reliability of those statements. The Court first examined the historical justification of the Confrontation Clause and concluded that the "principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." *Crawford*, 541 U.S. at 50-51. The Court thus rejected the notion that the Confrontation Clause should be limited to the right to cross-examine only in-court testimony. The Court opined that "[l]eaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices." *Id.*

While the Court declined to offer a "comprehensive" definition of testimonial statements triggering a defendant's Sixth Amendment rights, it did note the dictionary definition of that word: "a solemn declaration or affirmation made for the purpose of

establishing or proving some fact." *Id.* The Court further noted that the "core class" of testimonial statements included: "*ex parte* in-court testimony or its functional equivalent – that is *material such as affidavits*, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that *declarants would reasonable be expected to be used prosecutorially*." *Id.* (Emphasis added) The Court concluded that admitting "statements deemed reliable by a judge is fundamentally at odds with the right of confrontation." In conclusion, the Court held that where "testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 68.

ADMISSIBILITY OF LAB REPORTS POST-CRAWFORD

In the wake of *Crawford*, the Virginia Court of Appeals recently addressed the admissibility of a blood alcohol certificate in a DUI prosecution and noted that this was "an issue of first impression in Virginia." *Luginbyhl v. Commonwealth*, 46 Va. App. 460, 464-65 (2005), *rehearing en banc granted*, 46 Va. App 545.[2] The court in *Luginbyhl* affirmed the

[2] According to a conversation with the clerk's office, as of April 4, 2006, the case was still pending with the Court of Appeals. The order agreeing to rehear the case reinstated

(Continued on following page)

defendant's DUI conviction and rejected the defendant's contention that the admission of a certificate of analysis showing blood alcohol content violated his rights under the Sixth Amendment to confront witnesses against him. The court seemed to depart from its earlier rulings in *Myrick* and other cases that a drug report was hearsay and admissible only because of the hearsay exception created by §19.2-187. Despite these precedents, the court strangely ruled that "the result of the breath test does not constitute hearsay" because the breath test result is generated by a machine and does not depend on the administering officer's veracity or perceptive abilities." *Id.* at 465-466. Moreover, the attestation clause in the certificate, while it was hearsay, was not "testimonial" and, thus, likewise did not violate defendant's Sixth Amendment right to confront witnesses against him. *Id.*

In dissent, Justice Benton cogently pointed out *Crawford*'s language, emphasized *supra*, that "affidavits" and other material "reasonably expected to be used prosecutorially" fell within the core class of testimonial statements to which *Crawford* afforded Confrontation Clause protection. *Id.* at 480. Justice Benton further emphasized that the "breath analysis and attestation of the operator were conducted solely to provide evidence in court to prove the facts

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defendant's appeal. Thus, the opinion in *Luginbyhl* has no current legal effect and does not serve as binding precedent.

necessary to convict" the defendant. *Id.* Finally, Justice Benton forcefully rejected the majority's argument that the breath certificate and attestation were admissible because the breathalyzer operator's role was "neutral" and "not accusatory". *Id.* at 483-85. As Justice Benton rightly concluded, the majority in *Luginbyhl* was essentially recreating the "reliability" standard which *Crawford* so forcefully rejected:

> The relevant factor under *Crawford* is that this evidence was generated to discover and report evidence against Luginbyhl, the accused. It was then used at trial for that purpose without the opportunity for cross-examination. Furthermore, whether the evidence is accusatory or neutral, it does bear testimony; it was prepared for use at trial by a government agent; it was a substitute for an actual witness; and it was admitted in evidence without the opportunity for cross-examination. Simply put, 'admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation.'"

Id., quoting *Crawford*, 541 U.S. at 61.

By the same token, the drug certificate in the present case was generated by a government agent solely to discover incriminating evidence against Defendant. According to the clear language of § 19.2-187, drug reports are likewise designed to substitute for the in-court testimony of chemists. The drug report was also created purely to prove an essential element of the Commonwealth's case, that Defendant

possessed an illegal substance. Finally, and most significantly in light of *Crawford*, Defendant will have no opportunity to either cross-examine any factual allegations contained in the drug report or explore and refute the circumstances surrounding its preparation. Whether the drug report is reliable or not is a moot issue after *Crawford* which eliminated reliability or the rules of evidence as a cure for a Confrontation Clause violation. Because the chemist's drug report is a core testimonial statement, it cannot be admitted against Defendant at trial unless the Commonwealth has shown both that its witness is unavailable *and* that it was subject to prior cross-examination. Because the Commonwealth can satisfy neither of these elements required by *Crawford*, the court should exclude the drug report because to admit it would be a clear violation of both *Crawford* and the Sixth Amendment's Confrontation Clause.

The court should also exclude the drug report because cases from other jurisdictions have interpreted *Crawford* to prohibit the introduction of lab reports or attestation affidavits without the opportunity to cross examine the witnesses who prepared them. For example, *see Shiver v. State*, 900 So.2d 615, 618 (Fla. App. 2005) (statements contained in breath test affidavit were "testimonial" because they "contained statements one would reasonably expect to be used prosecutorially"). Similar results were reached in *City of Las Vegas v. Walsh*, 91 P.3d 591, 595 (Nev. 2004), *rev'd on unrelated grounds*, 124 P.3d 203 (2005); and *People v. Rogers*, 8 A.D.3d 888, 780

N.Y.S. 2d 393 (N.Y. App. Div. 2004). Other cases have ruled that admission of such reports or affidavits does not conflict with the rule of law announced in *Crawford*. *See Luginbyhl*, 46 Va. App. at 474-75 (recitation of cases holding that lab reports or other affidavits may be admitted without cross-examination and without violating Confrontation Clause) However, the plain language of *Crawford* leads to the more reasonable conclusion that lab reports are "testimonial" just as "affidavits . . . the defendant was unable to cross-examine" were deemed violative of the Confrontation Clause in *Crawford*. 541 U.S. at 51. Allowing introduction of the drug lab report under these circumstances would amount to an implicit return to the "reliability" standard decisively rejected in *Crawford*.

CONCLUSION

The laboratory drug report in the instant case was plainly created for the sole purpose of prosecuting Defendant and for preparing and introducing evidence of an important element of the charged offenses. As such, the drug report is a "testimonial" out-of-court statement triggering the protections of the Confrontation Clause of the Sixth Amendment. According to the clear holding of *Crawford*, the drug report cannot be admitted unless the Commonwealth shows both the unavailability of the preparer of the report and the opportunity for prior cross-examination. The Commonwealth can show neither of these prerequisites for introduction of the out of court

statements contained in the drug report. The court should exclude the drug report from evidence because its introduction would violate Defendant's Sixth Amendment right to confront witnesses against him and would contravene the Court's holding in *Crawford*.

SHELDON A. CYPRESS

By /s/ Thomas B. Shuttleworth
Of Counsel

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was hand delivered to the Attorney for the Commonwealth this 6th day of ~~March~~ April 2006.

/s/ Thomas B. Shuttleworth
Thomas B. Shuttleworth, Esq.

Trial Order (Cypress)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

HEARING DATE : 04/06/2006
JUDGE : S. Bernard Goodwyn

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 550

COMMONWEALTH OF VIRGINIA
vs
Sheldon A. Cypress, DEFENDANT
Alias : none
SSN : [Social Security number omitted]
DOB : [Date of birth omitted]
SEX : Male
RACE : Black

CRIMINAL ORDER
Case No.(s): CR05-3793

Attorney for the Commonwealth : Amy E. James
Attorney for the Defendant : Thomas Shuttleworth
Court Reporter : Beth Chandler

The defendant was present and represented by counsel.

The defendant pled NOT GUILTY. With the consent of the defendant, concurred in by the court and the attorney for the Commonwealth, the court heard and determined the case without a jury.

The Commonwealth's evidence was presented.

At the conclusion of the Commonwealth's evidence, the Court denied the defendant's motions to strike the Commonwealth's evidence.

The defendant presented no evidence.

At the conclusion of all the evidence, the Court denied the renewed motions of the defendant to strike the Commonwealth's evidence.

After hearing all the evidence, the Court found the defendant GUILTY of the following offense(s):

CASE NO.	OFFENSE (F/M)	DATE	SECTION	V.C.C.
CR05-3793	Distribute Cocaine – Second or Subsequent Offense (F)	06/25/05	18.2-248	NAR3038-F9

REFERRAL TO PROBATION

The Court directed the probation officer of this Court to prepare a presentence report.

The Court continued further proceedings to 06/09/06 at 8:30 a.m. for sentencing.

For good cause shown, the Court ORDERED that the bond be revoked and the defendant be remanded to jail, for reasons stated on the record.

SUBSTANCE ABUSE SCREENING AND ASSESSMENT FOR FELONY CONVICTIONS

If the defendant has been convicted of a felony, not a capital offense, committed on or after January 1, 2000, the defendant shall undergo a substance abuse screening pursuant to § 18.2-251.01 as directed by the Probation Office. The results of the screening and assessment if indicated shall be included in the presentence report pursuant to § 19.2-299(D).

Distribution of Copies. The Clerk shall send a copy of this Order to the: Probation Office of this Court

ENTERED: 4/19/06

/s/ SB Goodwyn
JUDGE

Clerk: jh

Sentencing Order (Cypress)

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHESAPEAKE

HEARING DATE : June 9, 2006
JUDGE : S. Bernard Goodwyn

FEDERAL INFORMATION PROCESSING STANDARDS CODE: 550

COMMONWEALTH OF VIRGINIA
vs
Sheldon Andria Cypress, DEFENDANT
Alias : None
SSN : [Social Security number omitted]
DOB : [Date of birth omitted]
SEX : Male
RACE : Black

SENTENCING ORDER
Case No.(s): CR05-3793

Attorney for the Commonwealth : Amy E. James
Attorney for the Defendant : Thomas B. Shuttleworth
Court Reporter : Robin Graven

The defendant was present and represented by counsel.

On April 6, 2006, the defendant was found GUILTY of the following offense(s):

CASE NO.	OFFENSE (F/M)	DATE	SECTION	V.C.C.
CR05-3793	Distribute Cocaine (F)	06/25/05	18.2-248	NAR3043-F9

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

The Court reviewed and considered the applicable discretionary sentencing guidelines and made the completed worksheet a part of the record of the case pursuant to the provisions of Code § 19.2-298.01.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: fifteen (15) years.

TOTAL SENTENCE IMPOSED:
fifteen (15) years

And imposes a fine of $1,000.00 for Distribute Cocaine.

The Court **SUSPENDS** ten (10) years of the sentence.
TOTAL SUSPENSION: ten (10) years

Sentence suspended upon the following conditions:

1. **Good behavior.** The defendant shall be of good behavior for an indeterminate period from the defendant's release from confinement.

2. **Supervised Probation.** The defendant is placed on Supervised Probation and the defendant shall comply with all the rules and requirements set by the Probation Officer.

   LENGTH OF PROBATION: For an indeterminate period.

   PROBATION TO BEGIN: Upon release from confinement.

3. **Costs.** The defendant shall pay the costs of Court.

4. **Fine.** The defendant shall pay a fine of $1,000.00.

Suspension of license for drug charge with an offense date on or after July 1, 1992. Pursuant to § 18.2-259.1 the defendant's privilege to drive or operate a motor vehicle, engine, or train in the Commonwealth is suspended for a period of six (6) months.

Distribution of Copies. The Clerk shall send a copy of this order to the:

Sheriff
Director of the Department of Corrections
Probation Office of this Court

Credit provision when time to be served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187.

Substance abuse screening and assessment for felony convictions pursuant to § 18.2-251.01. If the defendant has been convicted of a felony offense, not a capital offense, committed on or after January 1, 2000, the defendant shall complete any substance abuse screening, assessment, testing, and treatment as directed by the Department of Corrections as part of the defendant's sentence. The defendant is subject to payment of all or part of the costs of the program or treatment, excluding the costs of the screening and assessment, based upon the defendant's ability to pay.

Right to Appeal. The defendant was advised of his/her right to appeal the decision of this Court to the Court of Appeals of Virginia.

Sentencing Summary

TOTAL SENTENCE IMPOSED	:	fifteen (15) years
TOTAL TIME SUSPENDED	:	ten (10) years
TOTAL TIME TO SERVE	:	five (5) years

ENTERED: 6/26/06

/s/ SB Goodwyn
JUDGE

Clerk: kj

One-Judge Opinion of the Court of Appeals of Virginia (Cypress)

***VIRGINIA*:**

In the Court of Appeals of Virginia on Wednesday *the* 3rd *day of* January, 2007.

Sheldon Andria Cypress, Appellant,

against Record No. 1547-06-01
Circuit Court Nos. CR05-3793

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Chesapeake

Per Curiam

This petition for appeal has been reviewed by a judge of this Court, to whom it was referred pursuant to Code § 17.1-407(C), and is denied for the following reasons:

I. Appellant contends the trial court erred in admitting the certificate of analysis as it violated his Sixth Amendment right of confrontation.

Appellant was charged with possession of cocaine with intent to distribute. During its case-in-chief, the Commonwealth sought to introduce a certificate of analysis performed on the substance found under the car seat in which appellant was sitting. Appellant objected, arguing the certificate was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and, thus, the presence of the individual performing the chemical analysis was required. The trial court

overruled appellant's objection and admitted the certificate.

The Confrontation Clause of the Sixth Amendment provides the accused with the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. Where testimonial evidence is concerned and the declarant does not appear at trial, *Crawford* held, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford,* 541 U.S. at 68. Where the declarant "appears for cross-examination at trial," however, the "Confrontation Clause places no constraints at all on the use" of the declarant's prior statements. *Id.* at 59 n.9.

This Court recently held, in *Brooks v. Commonwealth*, ___ Va. App. ___, ___, ___ S.E.2d ___, ___ (Dec. 19, 2006), that assuming a certificate of analysis constitutes testimonial evidence under *Crawford* a defendant's confrontation rights are nonetheless protected by the procedures provided by Code §§ 19.2-187 and 19.2-187.1 Code § 19.2-187.1 provides the defendant with the "right to call the person performing such analysis or examination" when a certificate of analysis is admitted into evidence. And such "witness shall be summoned and appear at the cost of the Commonwealth." Code § 19.2-187.1.

Code § 19.2-187.1 sets out a "reasonable procedure to be followed in order for a defendant to exercise his right to confront" the preparer of a certificate of analysis. *Brooks*, ___ Va. App. at ___. ___

S.E.2d at ___. Here, appellant never notified the Commonwealth or the trial court of his desire to confront the witness until the middle of trial. His "failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses." *Id.*

II. Appellant contends the trial court erred by qualifying Detective Shearin as an expert on the use, sale, distribution, and packaging and distribution of narcotics.

"The admission of expert testimony is committed to the sound discretion" of the trial court and will be reversed "only where that court has abused its discretion." *Commonwealth v. Allen*, 269 Va. 262, 274, 609 S.E.2d 4, 12 (2005) (citation omitted). "A witness is qualified to speak as an expert when 'he possesses sufficient knowledge, skill or experience to make him competent to testify . . . on the subject matter of the inquiry.'" *Nichols v. Commonwealth*, 6 Va. App. 426, 431-32, 369 S.E.2d 218, 221 (1988) (quoting *Noll v. Rahal*, 219 Va. 795, 800, 250 S.E.2d 741, 744 (1979)).

At trial, the Commonwealth called Detective Shearin who testified that he had been a police officer in Chesapeake for over seven and one half years. For the past three and one half years, Shearin has been assigned to special investigations dealing specifically with vice and narcotics. He listed various conferences and classes he has attended over the past six years dealing with drug packaging and distribution issues. In addition, during his law-enforcement career, Shearin

has made over 450 drug arrests, "interviewed users, interviewed dealers . . . seen drugs on the street [and] how they're packaged." The trial court recognized Detective Shearin as an expert on drug packaging and distribution "based upon his experience and training."

Appellant complains "the trial court was clearly incorrect in qualifying Shearin as an expert witness" as his qualifications were not "peer review tested" and consisted solely of "interactions with other officers." This Court disagrees.

The record reveals ample evidence to support the trial court's decision to allow Shearin to testify as an expert. He was an experienced narcotics police officer and had received specialized training in the possession and distribution of drugs. "All that is necessary" is that the witness have "sufficient knowledge of his subject to give value to his opinion." *Kern v. Commonwealth*, 2 Va. App. 84, 86, 341 S.E.2d 397, 399 (1986) (quoting *Norfolk & W.R. Co. v. Anderson*, 207 Va. 567, 571, 151 S.E.2d 628, 631 (1966)). "Specialized formal training is unnecessary, . . . [and] experience alone [can] qualify one as an expert." *Id.*; *see also Mitchell v. Commonwealth*, No. 2037-05-1, 2006 Va. App. LEXIS 530, at *6 (Nov. 21, 2006) (unpublished).

Based on Shearin's training and experience, the trial court did not abuse its discretion in finding him qualified to give an opinion as to drug packaging and distribution.

This order is final for purposes of appeal unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code § 17.1-407(D) and Rule 5A:15(a) or 5A:15A(a), as appropriate. If appellant files a demand for consideration by a three-judge panel, the demand shall include a one-page statement identifying specifically how this order is in error.

The Commonwealth shall recover of the appellant the costs in the trial court.

This Court's records reflect that Thomas B. Shuttleworth, Esquire, and Charles B. Lustig, Esquire, are counsel of record for appellant in this matter.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ Marty V.P. Ring
Deputy Clerk

Three-Judge Opinion of the Court of Appeals of Virginia (Cypress)

***VIRGINIA*:**

In the Court of Appeals of Virginia on Friday *the* 23rd *day of* March, 2007.

Sheldon Andria Cypress, Appellant,

against Record No. 1547-06-01
Circuit Court No. CR05-3793

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Chesapeake

Before Judges Frank,
McClanahan and Senior Judge Willis

For the reasons previously stated in the order entered by this Court on January 3, 2007, the petition for appeal in this case hereby is denied.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By: /s/ [Illegible]
Deputy Clerk

Opinion and Dissent of the Supreme Court of Virginia

Michael Ricardo MAGRUDER

v.

COMMONWEALTH of Virginia.

Sheldon A. Cypress

v.

Commonwealth of Virginia.

Mark A. Briscoe

v.

Commonwealth of Virginia.

Record Nos. 070762, 070815, 070817.

Supreme Court of Virginia.

Feb. 29, 2008.

Joseph R. Winston, Special Appellate Counsel, for appellant Michael Ricardo Magruder.

Thomas B. Shuttleworth, Charles B. Lustig (Shuttleworth, Ruloff, Swain, Haddad & Morecock, on brief), Virginia Beach, for appellant Sheldon A. Cypress.

Joseph D. King, Asst. Public Defender, for appellant Mark A. Briscoe.

Stephen R. McCullough, Deputy State Sol. Gen., Alice T. Armstrong, Asst. Atty. Gen. II, Eugene Murphy, Senior Asst. Atty. Gen. (Robert F. McDonnell,

Atty. Gen., William E. Thro, State Sol. Gen., on briefs), for appellee.

Present: HASSELL, C.J., KEENAN, KOONTZ, KINSER, LEMONS and AGEE, JJ., and STEPHENSON, Senior Justice.

OPINION BY Justice CYNTHIA D. KINSER.

In each of these appeals, the defendant claims that the admission into evidence, pursuant to Code § 19.2-187, of a certificate of analysis in the absence of testimony at trial from the person who performed the particular analysis and prepared the certificate violated his rights under the Confrontation Clause of the Sixth Amendment. Because the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause and because the defendants in these appeals failed to utilize that procedure, we conclude that they waived the challenges under the Confrontation Clause to the admissibility of the certificates of analysis. We will therefore affirm the judgments of the Court of Appeals upholding the various convictions at issue.

I. RELEVANT FACTS AND PROCEEDINGS

Although these appeals involve a common dispositive question of law, which we review de novo, *Torloni v. Commonwealth,* 274 Va. 261, 267, 645 S.E.2d 487, 490 (2007), their facts and procedural histories differ. Therefore, we will first summarize

the relevant facts of each case and then analyze the dispositive issue that the appeals share. The appeal by Mark A. Briscoe involves one additional issue that we will address separately following the analysis of the dispositive issue.

A. *Magruder v. Commonwealth*

During a consensual search of Michael Ricardo Magruder, Officer William Catlett of the City of Winchester Police Department discovered an "off-white rock-like substance" in the right front pocket of Magruder's pants. Catlett suspected the substance was crack cocaine. Catlett took possession of the "rock" and submitted it to a forensic laboratory for testing. A forensic analyst with the Department of Criminal Justice Services, Division of Forensic Science, tested the substance and reported in a certificate of analysis that it was "0.022 gram[s]" of cocaine. In the certificate, the analyst also attested that he had performed the analysis and that the certificate was "an accurate record of the results of that analysis."

Magruder was subsequently indicted in the Circuit Court of the City of Winchester for possession of cocaine, in violation of Code § 18.2-250(A). At a bench trial, the Commonwealth offered into evidence the certificate of analysis. Relying on the decision in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), Magruder objected, asserting that the admission of the certificate of analysis would

violate his Sixth Amendment right to confront the witness against him. The circuit court overruled Magruder's objection, stating: "*Crawford* only applies to testimonial evidence. You have a right to call [the forensic analyst] if you want to." Magruder did not call the forensic analyst to testify and presented no evidence refuting the accuracy of the analysis of the substance seized from him, as reported in the certificate of analysis. The circuit court convicted Magruder of possession of cocaine and sentenced him to a suspended term of one year and six months of incarceration, with two years of supervised probation.

The Court of Appeals affirmed Magruder's conviction in an unpublished opinion. *Magruder v. Commonwealth,* Record No. 1982-05-4, 2007 WL 737552 (March 13, 2007). Relying on its decision in *Brooks v. Commonwealth,* 49 Va.App. 155, 638 S.E.2d 131 (2006), the Court of Appeals held that the procedures set forth in Code §§ 19.2-187 and 19.2-187.1 adequately protected Magruder's Confrontation Clause rights and that Magruder's failure to notify the Commonwealth of his desire to cross-examine the forensic analyst at trial waived his right to do so. *Magruder,* at *1. Thus, the Court of Appeals concluded that the circuit court did not err in admitting the certificate of analysis in the absence of testimony from the person who performed the analysis. *Id.*

On appeal to this Court, Magruder presents two assignments of error:

I. The Court of Appeals erred in concluding that . . . Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial.

II. The Court of Appeals erred in concluding that a defendant's failure to timely notify the Commonwealth of his desire to confront the forensic analyst at trial constitutes a waiver of that right.

B. *Cypress v. Commonwealth*

Sheldon A. Cypress was a passenger in an automobile being driven by his cousin when a trooper with the Virginia State Police stopped the vehicle because of its improperly tinted windows. The driver consented to a search of the vehicle. During that search, the trooper found, among other things, two plastic bags – one under the driver's seat and one under the passenger's seat – each containing a "chunky white substance" that the trooper suspected was crack cocaine. Subsequent forensic testing at the Department of Forensic Science revealed that the substance was cocaine, totaling 60.5 grams. A certificate of analysis reporting those results bore the signature of the forensic analyst who conducted the testing and included an attestation that she had performed the analysis.

Cypress was indicted in the Circuit Court of the City of Chesapeake for possession of cocaine with the

intent to distribute, having previously committed the offense of distribution or possession with the intent to distribute, in violation of Code § 18.2-248(C). At a bench trial, the Commonwealth moved to admit the certificate of analysis into evidence. Cypress objected, arguing that under the holding in *Crawford* the certificate fell into a core class of testimonial evidence and was therefore inadmissible in the absence of testimony from the person who performed the analysis of the seized substance. The circuit court overruled the objection, holding that "the scientific results stated in the certificate of analysis are not testimonial statements as that term is defined or described in *Crawford v. Washington*."[1]

Cypress did not call the forensic analyst as a witness and presented no evidence. The circuit court convicted Cypress of possession of cocaine with the intent to distribute, second or subsequent offense, and sentenced him to imprisonment for 15 years, with 10 years suspended, and a fine of $1,000.[2]

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[1] Cypress renewed his Confrontation Clause challenge to the admissibility of the certificate of analysis again in motions to strike the Commonwealth's evidence, in a post-trial motion, and at sentencing. The circuit court denied the renewed motions for the reasons originally stated.

[2] There appears to be a discrepancy between the conviction order of April 19, 2006 and the sentencing order of June 26, 2006. The conviction order states that Cypress was convicted of distributing cocaine, a second or subsequent offense. The sentencing order, however, states that he was convicted of distributing cocaine.

The Court of Appeals denied Cypress' appeal in an unpublished per curiam order. *Cypress v. Commonwealth,* Record No. 1547-06-1 (January 3, 2007). Citing its decision in *Brooks,* the Court of Appeals stated: "assuming a certificate of analysis constitutes testimonial evidence under *Crawford,* a defendant's confrontation rights are nonetheless protected by the procedures provided by Code §§ 19.2-187 and 19.2-187.1." *Id.,* slip op. at 2. The Court of Appeals, however, held that Cypress waived his right to confront the forensic analyst who prepared the certificate of analysis because he did not utilize the procedure set forth in Code § 19.2-187.1. *Id.* For the reasons stated in the January 3, 2007 order, a three-judge panel of the Court of Appeals also denied the petition for appeal. *Cypress v. Commonwealth,* Record No. 1547-06-1 (March 23, 2007).

Now on appeal to this Court, Cypress raises two assignments of error:

> I. The trial court erred by allowing into evidence the certificate of analysis over Defendant's objection that its introduction violated his Sixth Amendment Confrontation Clause rights as articulated in *Crawford v. Washington* and its progeny; the trial court erred by finding Cypress guilty of possession with intent to distribute cocaine where the only evidence that he possessed cocaine came from this drug certificate which should have been excluded from evidence[.]

II. The Court of Appeals erred by ruling that Defendant waived his Confrontation Clause rights by declining to subpoena the chemist who prepared the certificate and this ruling impermissibly, and unconstitutionally, required Defendant to take affirmative steps to safeguard his Confrontation Clause rights[.]

C. *Briscoe v. Commonwealth*

Police officers with the City of Alexandria Police Department executed a search warrant for the apartment of Mark A. Briscoe. During the search, the officers seized suspected cocaine scattered about in the apartment's kitchen area, as well as two scales, a razor blade, a 100-gram weight, a box of plastic sandwich bags, and a plate. Many of these items appeared to have deposits of drug residue on them. In a search of Briscoe's person, the police seized a white, rock-like substance wrapped in plastic from the pocket of his shorts.

The police submitted the items of suspected cocaine to the Department of Criminal Justice Services, Division of Forensic Science, for testing. In two certificates of analysis, a forensic analyst reported that the confiscated substances were "solid material" cocaine totaling 36.578 grams. The certificates also contained the analyst's signature and attestation that she performed the analyses and that the certificates accurately reflected the results of those analyses.

Briscoe was indicted in the Circuit Court of the City of Alexandria for possession with the intent to distribute cocaine, in violation of Code § 18.2-248(C), unlawful transportation of cocaine into the Commonwealth with the intent to distribute, in violation of Code § 18.2-248.01, and conspiracy to distribute cocaine, in violation of Code §§ 18.2-248 and 18.2-256. During a bench trial, the Commonwealth sought to admit into evidence the two certificates of analysis. Briscoe objected, arguing that their admission, without the forensic analyst present to testify, violated his confrontation rights under the Sixth Amendment. Relying on the decision in *Crawford,* Briscoe asserted that the certificates were testimonial because they contained solemn declarations or affirmations that the Commonwealth sought to use in order to establish an element of the charged offenses. Briscoe also claimed that the procedure provided in Code § 19.2-187.1 permitting a defendant to call a forensic analyst as an adverse witness does not protect his confrontation rights and actually imposes an unconstitutional affirmative step that he must take in order to assert his Sixth Amendment right of confrontation.

The circuit court overruled Briscoe's objection, holding that the procedure in Code § 19.2-187.1 preserved his right to cross-examine the forensic analyst. In response to the circuit court's ruling, Briscoe further argued that the statutory right to call the forensic analyst as an adverse witness does not satisfy his constitutional right to confront the

Commonwealth's witness and also impermissibly shifts the burden to produce evidence to a criminal defendant. The circuit court did not change its ruling.

Briscoe did not call the forensic analyst to testify and presented no evidence. The circuit court convicted Briscoe of possession with the intent to distribute cocaine and transportation of cocaine into the Commonwealth with the intent to distribute. The court sentenced Briscoe to a total of 20 years of incarceration, with all but 5 years and 8 months suspended.

The Court of Appeals denied Briscoe's appeal in an unpublished per curiam order. *Briscoe v. Commonwealth,* Record No. 1478-06-4 (January 18, 2007). Assuming, without deciding, that the certificates of analysis constituted "testimonial" evidence under *Crawford,* the Court of Appeals held that Briscoe's right to confront the forensic analyst was protected by the procedure provided in Code § 19.2-187.1. *Id.,* slip op. at 2 (citing *Brooks,* 49 Va.App. at 161, 638 S.E.2d at 134). The court further held that, by failing to follow that statutory procedure, Briscoe waived his constitutional right to confront the forensic analyst who prepared the certificates. *Id.* Briscoe sought review of the Court of Appeals per curiam order, and a three-judge panel denied that petition for appeal for the reasons stated in the January 18, 2007 order. *Briscoe v. Commonwealth,* Record No. 1478-06-4 (March 26, 2007).

On appeal to this Court, Briscoe raises this assignment of error with regard to the certificates of analysis:[3]

> I. The Court of Appeals erred in upholding the trial court's finding that Defendant's constitutional right to confront and cross-examine adverse witnesses was not violated by the admission of the certificates of drug analysis into evidence.

II. ANALYSIS

A. *Confrontation Clause*

The dispositive issue before us is whether the procedure set forth in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause of the Sixth Amendment, and if so, whether Magruder, Cypress, and Briscoe (collectively, the defendants) waived their Confrontation Clause challenges to the admissibility of the respective certificates of analysis by failing to utilize that procedure. Before resolving that issue, we first turn to the decision of the Supreme Court of the United States in *Crawford v. Washington,* since the defendants relied on it in claiming that admission into evidence of the certificates of analysis violated their confrontation rights. Prior to that decision, the

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[3] Briscoe presents an additional, unrelated assignment of error that the Court will address in a separate section of this opinion.

Confrontation Clause had not been construed to bar the admission of an unavailable witness' hearsay statement against a criminal defendant if the statement bore sufficient "indicia of reliability" either by falling within a "firmly rooted hearsay exception" or by "a showing of particularized guarantees of trustworthiness." *Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). In *Crawford,* the Supreme Court rejected the *Roberts* analysis and held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability [of the witness] and a prior opportunity for cross-examination." 541 U.S. at 68, 124 S.Ct. 1354; *accord Hodges v. Commonwealth,* 272 Va. 418, 428-29, 634 S.E.2d 680, 685 (2006).

Now, under *Crawford,* the question whether admission of a hearsay statement against a criminal defendant violates the Confrontation Clause turns on whether the statement is "testimonial" in nature. *See Anderson v. Commonwealth,* 274 Va. 469, 478, 650 S.E.2d 702, 707 (2007) (in Confrontation Clause challenges since *Crawford,* the inquiry has been whether a hearsay statement is testimonial); *Riner v. Commonwealth,* 268 Va. 296, 322, 601 S.E.2d 555, 570 (2004) (to decide whether admission of a hearsay statement violates the Confrontation Clause, the Supreme Court distinguished between "testimonial" and "non-testimonial" hearsay). The Supreme Court declined to provide a comprehensive definition of the term "testimonial" in *Crawford,* but it did state that the term "applies at a minimum to prior testimony at

a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." 541 U.S. at 68, 124 S.Ct. 1354; *see also Davis v. Washington,* 547 U.S. 813, 813-14, 126 S.Ct. 2266, 165 L.Ed.2d 224, (2006) (holding that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency [but] [t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution").

In these appeals, it is not necessary to decide whether a certificate of analysis is "testimonial." Even if we assume the certificates in the cases at bar are testimonial, the decision in *Crawford* did not address the issues before us, i.e., whether a prescribed statutory demand procedure adequately protects a criminal defendant's rights under the Confrontation Clause and whether failure to follow that procedure waives the right to confront a particular witness. *See Brown v. State,* 939 So.2d 957, 960 (Ala.Crim.App.2005) ("*Crawford* speaks to the issue of the meaning and scope of the Confrontation Clause; it does not, however, speak to the issues of preservation and waiver of a criminal defendant's confrontation right."); *Hinojos-Mendoza v. People,* 169 P.3d 662, 668 (Colo.2007) ("*Crawford* did not alter the fact that the right to confrontation can be waived.").

We now begin our analysis by examining the two relevant statutes, Code §§ 19.2-187 and 19.2-187.1. The first statute permits a certificate of analysis, when "duly attested" by the "person performing an analysis or examination" in certain laboratories, to be admitted into evidence "[i]n any hearing or trial of any criminal offense . . . as evidence of the facts therein stated and the results of the analysis or examination referred to therein." Code § 19.2-187. The only proviso is the requirement that the certificate of analysis be "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." *Id.* The second statute, Code § 19.2-187.1, establishes a procedure that presents an accused with the opportunity to question the person performing the analysis or examination as an adverse witness. That statute states:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

Code § 19.2-187.1.

In each of the cases before us, the Court of Appeals relied on its decision in *Brooks* to hold that

the defendants waived their right to confront the forensic analysts who prepared the certificates of analysis admitted into evidence at their respective trials because they failed to utilize the statutory procedure available to them. In *Brooks,* the accused objected to the introduction of certificates of analysis into evidence on the basis that "the Commonwealth's failure to call the forensic scientist who tested the substances denied him his constitutional right to confrontation under *Crawford.*" 49 Va.App. at 158, 638 S.E.2d at 133. The Court of Appeals rejected that argument, holding that "Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial and that a defendant's failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses." *Id.* at 164-65, 638 S.E.2d at 136.

Noting that an accused can voluntarily waive the right of confrontation and that reasonable requirements may be attached to the assertion of federal constitutional rights, the Court of Appeals reasoned that, in light of the decision in *Crawford,* "Code §§ 19.2-187 and 19.2-187.1[ ] are merely a request to the defendant to stipulate to the admissibility of the contents of any properly filed certificates of analysis" and that when an accused "waits until trial to assert his right to cross-examine the analyst who prepared a particular certificate, he accepts the request to stipulate and waives his right to confront that

witness." *Id.* at 167, 638 S.E.2d at 137; *see also State v. Cunningham,* 903 So.2d 1110, 1119 (La.2005) (holding such statutes "are a formalized means of effectuating a stipulation to the admissibility of matters which often are not in dispute"). Continuing, the Court of Appeals explained that, if an accused does not wish to accept the requested stipulation, "Code § 19.2-187.1 provides the mechanism by which he may reject the request and have the analyst summoned to appear at trial at the cost of the Commonwealth in order to be subject to cross-examination." *Brooks,* 49 Va.App. at 167-68, 638 S.E.2d at 138.

Finally, the Court of Appeals held that the argument claiming the procedure in Code § 19.2-187.1 unconstitutionally places the burden on an accused to present evidence in order to exercise his confrontation rights was not before it because the defendant did not summon the forensic analyst or ask the Commonwealth to do so. *Id.* at 168, 638 S.E.2d at 138. Thus, according to the Court of Appeals, the trial court never had the occasion to rule on any challenge regarding the order of proof. *Id.*

The defendants here assert that *Brooks* was wrongly decided and argue that they did not waive their Sixth Amendment right to confront the forensic analysts by failing to call those persons as adverse witnesses under the provisions of Code § 19.2-187.1. According to the defendants, the procedure provided in Code § 19.2-187.1 does not adequately protect the Sixth Amendment right of confrontation for several

reasons: (1) the statute requires an accused to take impermissible affirmative steps to secure the right to confront the forensic analyst; (2) the statute does not provide any notice that failure to utilize its provisions will automatically waive the right to confront the forensic analyst; (3) the statute does not insure that a waiver of the Sixth Amendment right to confront the forensic analyst is knowing, voluntary, and intelligent; (4) the statute by its terms addresses the order of proof and impermissibly requires an accused to present evidence in order to preserve confrontation rights; and (5) the statute allows an accused to cross-examine the forensic analyst only after a certificate of analysis has already been admitted into evidence.[4]

The Confrontation Clause of the Sixth Amendment to the Constitution of the United States provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This guarantee is enforced against the states through the Fourteenth Amendment. *Pointer v. Texas,* 380 U.S. 400, 401, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The

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[4] Additionally, Magruder claims that the Court of Appeals re-wrote Code § 19.2-187.1 because its provisions do not mention a stipulation or require notice by an accused to the Commonwealth or trial court that he wishes to have the forensic analyst present at trial.

Cypress also asserts that the Court of Appeals erred by addressing the waiver issue sua sponte. That alleged error is not, however, the subject of an assignment of error. *See* Rule 5:17(c).

Confrontation Clause secures the "literal right to 'confront' the witness at the time of trial." *California v. Green,* 399 U.S. 149, 157, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). "The substance of the constitutional protection is . . . seeing the witness face to face, and . . . subjecting him to the ordeal of a cross-examination." *Mattox v. United States,* 156 U.S. 237, 244, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *see also United States v. Owens,* 484 U.S. 554, 559, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) ("[t]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination'") (quoting *Kentucky v. Stincer,* 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (emphasis in original)); *James v. Commonwealth,* 254 Va. 95, 98, 487 S.E.2d 205, 207 (1997) ("The Confrontation Clause . . . grants a criminal defendant the right to cross-examine witnesses called by the prosecution.").

The right to confront "(1) insures that the witness will give his statements under oath . . . ; (2) forces the witness to submit to cross-examination . . . ; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement." *Green,* 399 U.S. at 158, 90 S.Ct. 1930. "The combined effect of these elements of confrontation – physical presence, oath, cross-examination, and observation of demeanor by the trier of fact – serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of

Anglo-American criminal proceedings." *Maryland v. Craig,* 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990); *see also Crawford,* 541 U.S. at 61, 124 S.Ct. 1354 (the "ultimate goal" of the Confrontation Clause "is to ensure reliability of evidence . . . by testing in the crucible of cross-examination").

With this understanding of the Confrontation Clause, the question whether the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's right to confront the forensic analyst turns on whether the statute supplies the "elements of confrontation – physical presence, oath, cross-examination, and observation of demeanor by the trier of fact." *Craig,* 497 U.S. at 846, 110 S.Ct. 3157. We conclude that it does. Pursuant to Code § 19.2-187.1, the defendants could have insured the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, or asking the trial court or Commonwealth to do so. At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them. *See Teleguz v. Commonwealth,* 273 Va. 458, 479, 643 S.E.2d 708, 721-22 (2007) (noting that a witness called as an adverse witness can be subjected to cross-examination); *Smith v. Lohr,* 204 Va. 331, 335, 130 S.E.2d 433, 436 (1963) (same). The trier of fact would then have had the opportunity to observe the demeanor of the witnesses. In short, if the defendants had utilized the procedure provided

in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts. *See Owens,* 484 U.S. at 559, 108 S.Ct. 838 (the Confrontation Clause guarantees opportunity for cross-examination). Contrary to the defendants' position, the Confrontation Clause does not insure that opportunity before a certificate of analysis is admitted into evidence. *See Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354 (the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").

Nevertheless, the defendants argue that this statutory procedure impermissibly burdens the exercise of their right under the Confrontation Clause by requiring them to take certain affirmative steps in order to assert that right. While "[m]ost . . . Sixth Amendment rights arise automatically on the initiation of the adversary process and no action by the defendant is necessary to make them active in his or her case," *Taylor v. Illinois,* 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), "the right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *see also Mattox,* 156 U.S. at 243, 15 S.Ct. 337 (noting that the right to confront a witness "must occasionally give way to considerations of public policy and the necessities of the case"). For example, "'trial judges retain wide latitude' to limit reasonably a criminal defendant's

right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" *Michigan v. Lucas,* 500 U.S. 145, 149, 111 S.Ct. 1743, 114 L.Ed.2d 205 (1991) (quoting *Delaware v. Van Arsdall,* 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)); *see also James,* 254 Va. at 98, 487 S.E.2d at 207 ("The Confrontation Clause . . . does not grant a defendant an unlimited right to cross-examination."). Even after *Crawford,* the Confrontation Clause does not bar the admission of testimonial hearsay statements if the declarant is unavailable, so long as the accused had a prior opportunity to cross-examine the witness. 541 U.S. at 68, 124 S.Ct. 1354.

Moreover, "[a] state procedural rule which forbids the raising of federal questions at late stages in the case, or by any other than a prescribed method, has been recognized as a valid exercise of state power." *Williams v. Georgia,* 349 U.S. 375, 382-83, 75 S.Ct. 814, 99 L.Ed. 1161 (1955). Virginia has adopted several provisions that require criminal defendants to take certain procedural steps in order to exercise or vindicate a myriad of constitutional rights. Pursuant to Code § 19.2-266.2, an accused must file a written motion to suppress evidence allegedly obtained in violation of the Fourth, Fifth, or Sixth Amendments no later that seven days before trial. *See also* Rule 3A:9. Failure to follow this statutory requirement results in a waiver of an accused's constitutional

challenge to the admissibility of the evidence. *Schmitt v. Commonwealth,* 262 Va. 127, 145-46, 547 S.E.2d 186, 199 (2001). Similarly, the provisions of Code § 18.2-67.7 impose notice-and-hearing requirements in order to introduce evidence concerning a victim's past sexual conduct with a person other than the accused. Such requirements are not unconstitutional but "serve[ ] legitimate state interests in protecting against surprise, harassment, and undue delay." *Lucas,* 500 U.S. at 152-53, 111 S.Ct. 1743.

An accused must also, upon request of the Commonwealth, disclose whether he intends to introduce evidence to establish an alibi. Rule 3A:11(c)(2). In *Williams v. Florida,* 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court held that a similar alibi-notice rule did not violate the Fifth Amendment. *Id.* at 85, 90 S.Ct. 1893. The Court observed that the rule, "[a]t most, . . . only compelled [the defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial." *Id.*; *see also United States v. Sanchez,* 361 F.2d 824, 825 (2nd Cir.1966) (the Sixth Amendment right to a speedy trial attaches upon arrest or the filing of formal charges but failure to demand a speedy trial waives the constitutional right); *State v. Jestes,* 75 Wash.2d 47, 448 P.2d 917, 920 (1968) (same).

"The test is whether the defendant has had 'a reasonable opportunity to have the issue as to the claimed right heard and determined by the state

court.'" *Michel v. Louisiana,* 350 U.S. 91, 93, 76 S.Ct. 158, 100 L.Ed. 83 (1955) (quoting *Parker v. Illinois,* 333 U.S. 571, 574, 68 S.Ct. 708, 92 L.Ed. 886 (1948)). The provisions of Code § 19.2-187.1 pass this test. We agree with the holding of the Court of Appeals in *Brooks:* "Code § 19.2-187.1 sets out a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial." 49 Va.App. at 164, 638 S.E.2d at 136.

> Legislatures may pass laws regulating, within reasonable limits, the mode in which rights secured to the subject by bills of right and constitutions shall be enjoyed, and if the subject neglects to comply with these regulations he thereby waives his constitutional privileges.

State v. Berg, 237 Iowa 356, 21 N.W.2d 777, 780 (Iowa 1946). Furthermore, nothing in the records before us suggest that any defendant was somehow precluded from utilizing the procedure provided in Code § 19.2-187.1 or that the procedure was unduly burdensome.

The defendants do, however, claim that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness. This argument is not cognizable under the Confrontation Clause. *See Owens,* 484 U.S. at 559, 108 S.Ct. 838 ("[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination.'") (alterations and

emphasis in original). Instead, it raises due process concerns that are not properly before us in these appeals. Because the defendants did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness." Like the situation in *Brooks,* "the trial court never had occasion to address the proper order of proof." 49 Va.App. at 168, 638 S.E.2d at 138; *but see Belvin v. State,* 922 So.2d 1046, 1054 (Fla.Dist.Ct.App.2006) ("[S]tatutory provision, [providing defendant with the opportunity to subpoena breath test operator,] does not adequately preserve the defendant's Sixth Amendment right to confrontation" because it impermissibly shifts the burden to the defendant to produce evidence.); *State v. Birchfield,* 342 Or. 624, 157 P.3d 216, 220 (2007) ("[I]t is clear that the transfer of legal responsibility to secure the attendance of the declarant from the state to the defendant cannot withstand constitutional scrutiny.").

Finally, it is undisputed that a criminal defendant can waive the right to confrontation. *See Taylor v. United States,* 414 U.S. 17, 19, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973) (confrontation rights waived by voluntary absence from the trial); *Illinois v. Allen,* 397 U.S. 337, 342-43, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (loss of confrontation rights through

misconduct in the courtroom); *Boykin v. Alabama,* 395 U.S. 238, 243, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) (confrontation rights waived by a guilty plea); *Diaz v. United States,* 223 U.S. 442, 450-51, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (waiver by consent to admission of absent witness's testimony); *United States v. Carlson,* 547 F.2d 1346, 1359-60 (8th Cir.1976) (a defendant's intimidation of a grand jury witness waived confrontation rights). The decision in *Crawford* did not alter that fact. *Hinojos-Mendoza,* 169 P.3d at 668. Indeed, a criminal defendant can waive a panoply of constitutional rights. *See Muhammad v. Commonwealth,* 269 Va. 451, 507, 619 S.E.2d 16, 48 (2005) (the right to present mitigating testimony "may be as venerated as the right to a jury, the right to counsel, the right against self-incrimination, and the right to exclusion of evidence seized in an unconstitutional manner," all which are "within the panoply of constitutional rights that may be waived by the accused"); *Fails v. Virginia State Bar,* 265 Va. 3, 8, 574 S.E.2d 530, 533 (2003) (noting that a criminal defendant may waive the right to demand counsel or a jury trial); *Commonwealth v. Washington,* 263 Va. 298, 304-05, 559 S.E.2d 636, 639 (2002) (double jeopardy rights can be waived expressly or by implication); *see also* Code § 19.2-266.2 (an accused waives his right to challenge the admission of evidence allegedly obtained in violation of the Fourth, Fifth and Sixth Amendments if he does not file a written motion to suppress at least seven days before trial); Code § 18.2-67.7(B) (rape shield statute imposes notice-and-hearing requirements in

order to secure the right to present certain evidence); Rule 3A:11(c)(2) (requiring defendant to disclose intent to present alibi evidence prior to trial or risk waiving the right to do so).

The defendants, however, contend that any waiver of confrontation rights cannot be presumed from a silent record and that, given the absence of any notice of a waiver in Code § 19.2-187.1, they did not knowingly, intelligently, and voluntarily waive their Sixth Amendment right to confront the forensic analysts. This Court, however, has never held that the record, in all circumstances, must affirmatively reveal that a criminal defendant personally waived his right to confrontation. In *Bilokur v. Commonwealth,* 221 Va. 467, 474, 270 S.E.2d 747, 752 (1980), we concluded that a defendant's "silence was tantamount to assent" that an incriminating extrajudicial statement would be admitted by stipulation. *Id.* We held "that the defendant, acting through counsel, waived his right to invoke the constitutional guarantee of confrontation." *Id.*; *see also United States v. Stephens,* 609 F.2d 230, 232-33 (5th Cir.1980) (counsel in a criminal case may waive a defendant's right of confrontation by stipulating to the admission of evidence); *cf. Washington,* 263 Va. at 304-05, 559 S.E.2d at 639 ("defendant implicitly consented to the [trial] court's declaration of a mistrial [and thereby] waived his double jeopardy rights").

We recognize that "[w]aiver is ordinarily an intentional relinquishment or abandonment of a

known right or privilege." *Allen v. Commonwealth,* 252 Va. 105, 111, 472 S.E.2d 277, 280 (1996). "What suffices for waiver depends on the nature of the right at issue." *New York v. Hill,* 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000). As the Supreme Court explained:

> "Whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake." *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). For certain fundamental rights, the defendant must personally make an informed waiver. *See, e.g., Johnson v. Zerbst,* 304 U.S. 458, 464-465, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (right to counsel); *Brookhart v. Janis,* 384 U.S. 1, 7-8, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel. "Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has – and must have – full authority to manage the conduct of the trial." *Taylor v. Illinois,* 484 U.S. 400, 417-418, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). As to many decisions pertaining to the conduct of the trial, the defendant is "deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be

> charged upon the attorney.'" *Link v. Wabash R. Co.*, 370 U.S. 626, 634, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) (quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L.Ed. 955 (1880)). Thus, decisions by counsel are generally given effect as to what arguments to pursue, *see Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), what evidentiary objections to raise, *see Henry v. Mississippi*, 379 U.S. 443, 451, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965), and what agreements to conclude regarding the admission of evidence, *see United States v. McGill*, 11 F.3d 223, 226-227 (C.A.1 1993). Absent a demonstration of ineffectiveness, counsel's word on such matters is the last.

Id. at 114-15, 120 S.Ct. 659.

The provisions of Code §§ 19.2-187 and 19.2-187.1 adequately inform a criminal defendant of the consequences of the failure to exercise the right to have a forensic analyst present at trial for cross-examination. Pursuant to Code § 19.2-187, a "duly attested" certificate of analysis that has been timely filed with the appropriate clerk of court is "admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein." The provisions of Code § 19.2-187.1 then inform a criminal defendant about what steps to take in order to secure the physical presence of the forensic analyst and subject that person to an oath, cross-examination, and a credibility determination by the trier of fact – the elements of confrontation. Once

the forensic analyst appears at trial for cross-examination, any Confrontation Clause problem disappears. *See Crawford,* 541 U.S. at 59 n. 9, 124 S.Ct. 1354 ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.").

Based on the provisions of Code §§ 19.2-187 and 19.2-187.1, no criminal defendant can seriously contend that he is not on notice that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis unless he utilizes the procedure provided in Code § 19.2-187.1. Failure to use the statutory procedure obviously waives the opportunity to confront the forensic analyst. Additionally, "everyone is conclusively presumed to know the law – that is, he is estopped from denying such knowledge." *King v. Empire Collieries Co.,* 148 Va. 585, 590, 139 S.E. 478, 479 (1927). Thus, we reject not only the defendants' contention that the statutes need to contain an explicit notice outlining the consequences of failing to utilize the procedure set forth in Code § 19.2-187.1, but also the assertion that their waiver of confrontation rights was not voluntary, intelligent, and knowing. Confrontation Clause rights are waived every day in this Commonwealth when a criminal defendant's attorney chooses not to object to the admission of hearsay evidence or stipulates to the admission of evidence. *See, e.g., People v. Campbell,* 208 Ill.2d 203, 280 Ill.Dec. 684, 802 N.E.2d 1205,

1213 (2003) (holding that "defense counsel may waive a defendant's right of confrontation as long as the defendant does not object and the decision to stipulate is a matter of trial tactics and strategy"); *Waldon v. State*, 749 So.2d 262, 265-66 (Miss.Ct.App.1999) (same); *Carr v. State*, 829 S.W.2d 101, 102-03 (Mo.Ct.App.1992) (same); *State v. Bromwich*, 213 Neb. 827, 331 N.W.2d 537, 540 (1983) (same). We have never required, nor should we, that the record affirmatively reflect a defendant's knowing, voluntary, and intelligent agreement to such waivers. *See Bilokur*, 221 Va. at 474, 270 S.E.2d at 752.

Thus, we hold that the procedure in Code § 19.2-187.1 adequately safeguards a criminal defendant's rights under the Confrontation Clause and that the defendants' failure in these cases to utilize that procedure waived their right to be confronted with the forensic analysts, i.e., to enjoy the elements of confrontation.[5] Other courts have reached similar

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[5] In light of our holding, Cypress' argument that there was insufficient evidence to sustain his conviction because the only evidence proving he possessed cocaine was the "inadmissible" certificate of analysis is without merit.

We are also not persuaded by the defendants' argument that, if the procedure in Code § 19.2-187.1 adequately protects a criminal defendant's confrontation rights, the Commonwealth could present all its evidence by affidavit and require a defendant to subpoena the witnesses in order to cross-examine them. We are not willing to engage in the sort of speculation urged by the defendants. Furthermore, the provisions of Code § 19.2-187 obviate the need for the Commonwealth to call one of

(Continued on following page)

conclusions. For example, in *Hinojos-Mendoza*, the court addressed a Colorado statute that makes "'[a]ny report . . . of the criminalistics laboratory'" admissible into evidence "'in the same manner and with the same force and effect as if the employee or technician . . . had testified in person.'" 169 P.3d at 665 (quoting Colo.Rev.Stat. § 16-3-309(5)). The court noted that pursuant to the statute, "'[a]ny party may request that such employee or technician testify in person at a criminal trial on behalf of the state . . . by notifying the witness and other party at least ten days before the date of such criminal trial.'" *Id.* (quoting Colo.Rev.Stat. § 16-3-309(5)). Failure to make a timely request was held to amount to a waiver of the right to confront the technician. *Id.* at 668. In concluding that the statute does not run afoul of the Confrontation Clause, the court explained that the statutory procedure "for ensuring the presence of the lab technician at trial does not deny a defendant the opportunity to cross-examine the technician, but simply requires that the defendant decide prior to trial whether he will conduct a cross-examination. The statute provides the opportunity for confrontation – only the timing of the defendant's decision is changed." *Id.*

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the limited number of forensic analysts to testify in every case in which a certificate of analysis is being offered into evidence if the defendant chooses not to exercise his confrontation rights by utilizing the procedure provided in Code § 19.2-187.1.

The court further noted that when "a defendant chooses not to take advantage of the opportunity to cross-examine a witness, the defendant has not been denied his constitutional right to confrontation." *Id.* Thus, the court held that, "where a defendant . . . is represented by counsel, the failure to comply with the statutory prerequisites . . . waives the defendant's right to confront the witness just as the decision to forgo cross-examination at trial would waive that right." *Id.* at 670; *see also Brown,* 939 So.2d at 961 (failure to make a timely objection in accordance with statutory requirements to the admissibility of a certificate of analysis waived the issue for appeal); *Cunningham,* 903 So.2d at 1121 (finding that the defendant's failure to follow statutory procedure and subpoena the person who performed the analysis waived his right of confrontation and explaining that, "[f]rom a practical standpoint, these statutes are no different from a situation in which the State offers hearsay evidence at trial [in that if the] defendant does not contemporaneously object, the hearsay is allowed into evidence"); *City of Las Vegas v. Walsh,* 121 Nev. 899, 124 P.3d 203, 209 (2005) (holding that statutory scheme adequately preserved the right of the accused under the Confrontation Clause and that "[f]ailure to exercise confrontation rights [under the statute] will act as a waiver of those rights with regard to the affidavits"); *State v. Campbell,* 719 N.W.2d 374, 378 (N.D.2006) (criminal defendant's failure to subpoena forensic scientist as provided by statute and to avail himself of opportunity to cross-examine the witness waived any Sixth Amendment

violation); *Deener v. State,* 214 S.W.3d 522, 528 (Tex.App.2006) ("Because [defendant] did not file a written objection to the use of the affidavits and certificate of analysis at least ten days before trial, his objection at trial was not timely and he forfeited his right of confrontation.").

We recognize that some courts have reached contrary conclusions, but we are not persuaded by their rationales. *See e.g., Thomas v. United States,* 914 A.2d 1, 20 (D.C.App.2006) (holding that confrontation rights may be waived if record shows constitutionally valid waiver); *People v. McClanahan,* 191 Ill.2d 127, 246 Ill.Dec. 97, 729 N.E.2d 470, 478 (2000) ("[S]tatute impermissibly requires a defendant to take a procedural step to secure his confrontation rights or be deemed to have waived them, and does not require that the waiver of this fundamental constitutional right be a knowing, intelligent, and voluntary act."); *State v. Laturner,* 38 Kan.App.2d 193, 163 P.3d 367, 377 (2007) (The statute in question violated a defendant's confrontation rights because "the defendant is deemed to have waived the Sixth Amendment confrontation right if the defendant fails to take affirmative steps to assert it."); *State v. Caulfield,* 722 N.W.2d 304, 313 (Minn.2006) ("At a minimum, any statute purporting to admit testimonial reports without the testimony of the preparer must provide adequate notice to the defendant of the contents of the report and the likely consequences of his failure to request the testimony of the preparer" in order for the defendant to make a knowing,

intelligent, and voluntary waiver of his confrontation rights.).

Therefore, we hold that the Court of Appeals did not err in affirming the judgments of the circuit courts admitting into evidence the respective certificates of analysis at issue in these appeals. We turn now to the unrelated issue raised by Briscoe.

B. *Sufficiency of Evidence to Prove Corpus Delicti*

In his remaining assignment of error, Briscoe asserts that "[t]he Court of Appeals erred in upholding the trial court's finding the evidence was sufficient to prove the corpus delicti of the offense of transporting cocaine into the Commonwealth." He argues that his uncorroborated confession was not sufficient to prove an essential element of this crime, specifically that he brought cocaine into the Commonwealth in violation of Code § 18.2-248.01.[6]

In any criminal prosecution, the Commonwealth must prove the corpus delicti, "that is, the fact that the crime charged has been actually perpetrated." *Cherrix v. Commonwealth*, 257 Va. 292, 305, 513 S.E.2d 642, 651 (1999). However, when an accused

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[6] In relevant part, the provisions of Code § 18.2-248.01 make it "unlawful for any person to transport into the Commonwealth by any means with the intent to sell or distribute one ounce or more of cocaine, coca leaves or any salt, compound, derivative or preparation thereof."

has fully confessed to commission of the crime, "only *slight* corroboration of the confession is required to establish *corpus delicti* beyond a reasonable doubt." *Id.* (emphasis added); *accord Clozza v. Commonwealth,* 228 Va. 124, 133, 321 S.E.2d 273, 279 (1984); *Campbell v. Commonwealth,* 194 Va. 825, 833, 75 S.E.2d 468, 473 (1953). While an accused cannot be convicted based solely on his or her confession, "[i]t is not necessary, however, that there be independent corroboration of all the contents of the confession, or even of all the elements of the crime. The requirement of corroboration is limited to the facts constituting the *corpus delicti.*" *Watkins v. Commonwealth,* 238 Va. 341, 348, 385 S.E.2d 50, 54 (1989). In addition, "corroborative facts supporting the *corpus delicti* may be furnished by circumstantial evidence as readily as by direct evidence." *Id.* at 349, 385 S.E.2d at 54 (citing *Epperly v. Commonwealth,* 224 Va. 214, 229, 294 S.E.2d 882, 891 (1982)).

Following his arrest and being advised of his *Miranda* rights, Briscoe told police that everything taken from his apartment during the search, including the cocaine, the crack, and the plastic bags, belonged to him. He stated that the cocaine found in the kitchen sink should have been about 40 grams and that he got it from "[his] man in [Washington,] D.C. two weeks ago" and brought it back to Alexandria. Briscoe confessed that his most recent purchase consisted of approximately 62 grams of cocaine and that the cocaine was hard, not powder, when he bought it. When asked where he obtained

cocaine, Briscoe named "three main guys" in Washington, D.C. as his sources. He also named five dealers to whom he sells the cocaine and explained the frequency of those sales and the profit he makes from the cocaine he buys. All of these statements were admitted into evidence during Briscoe's trial.

We agree with the Court of Appeals' holding that "[Briscoe's] confession that he brought the [cocaine] from D.C. to Alexandria, along with the evidence seized from his person and his apartment, sufficiently established the *corpus delicti* of the transportation offense." *Briscoe v. Commonwealth,* Record No. 1478-06-4, slip op. at 4 (January 18, 2007). The "solid material" cocaine seized from Briscoe's apartment was consistent with the type of cocaine he admittedly purchased two weeks before the search and the remaining 36.578 grams was consistent with the amount he purchased and the frequency of his sales during a two-week period. The presence of the cocaine, scales, weights, and plastic bags inside Briscoe's apartment provided more than the slight evidence necessary to corroborate Briscoe's confession and establish the corpus delicti beyond a reasonable doubt. *See Cherrix,* 257 Va. at 305, 513 S.E.2d at 651.

Contrary to Briscoe's argument, the Court's decision in *Phillips v. Commonwealth,* 202 Va. 207, 116 S.E.2d 282 (1960), is distinguishable. There, the defendant confessed to the crime of sodomy. *Id.* at 209, 116 S.E.2d at 283. We held that, while the victim's possession of the defendant's vehicle corroborated the defendant's statement that he and

the victim were in each other's presence at a particular time, "it furnishe[d] no corroboration that the actual crime of sodomy for which [the defendant] was convicted was committed." *Id.* at 211, 116 S.E.2d at 285. The victim's possession of the vehicle neither established the commission of the crime nor corroborated the defendant's confession that he committed the crime of sodomy. *Id.* at 212, 116 S.E.2d at 285. As we have already explained, the items seized during the search of Briscoe's apartment provided the necessary corroboration to establish the corpus delicti.

III. CONCLUSION

For these reasons, we will affirm the judgment of the Court of Appeals in each of these appeals.

Record No. 070762 – Affirmed.

Record No. 070815 – Affirmed.

Record No. 070817 – Affirmed.

Justice KEENAN, with whom Chief Justice HASSELL and Justice KOONTZ join, dissenting.

Today the majority holds that a defendant's failure to exercise a statutory right under Code § 19.2-187.1 results in the forfeiture of his Sixth Amendment right "to be confronted with the witnesses against him." In my view, this analysis confuses the waiver of a statutory right with the

waiver of a constitutional right. Because the certificates of analysis at issue were "testimonial" hearsay, within the meaning of *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), their admission into evidence under Code § 19.2-187 in the prosecution's cases in the absence of supporting testimony from certificates' authors, violated the defendants' Confrontation Clause rights. Thus, I disagree with the majority's holding that Code § 19.2-187.1 preserves a defendant's Confrontation Clause rights, or that a defendant's failure to exercise rights accorded under that statute results in the surrender of Confrontation Clause rights.

I. "TESTIMONIAL" CHARACTER OF EVIDENCE

I would hold that the certificates of analysis are "testimonial" hearsay based on the Supreme Court's analysis of that term in *Davis* and *Crawford.* In particular, the analysis in *Davis* instructs us to examine the purpose for which a non-testifying witness initially made the statements that were later introduced in evidence at a criminal trial, and to inquire whether the person making the hearsay statements was "testifying" and "acting as a witness." *See Davis,* 547 U.S. at 828, 126 S.Ct. at 2277.

In *Crawford,* the Supreme Court held that the Sixth Amendment forbids the admission in a criminal trial of "testimonial" hearsay statements made

against an accused by a witness who does not testify at the trial, unless the witness is unavailable or the defendant had a prior opportunity to cross examine that witness. 541 U.S. at 68, 124 S.Ct. 1354. At the defendant's criminal trial in *Crawford,* the trial court admitted in evidence a tape-recorded statement that the defendant's wife made to police officers during a police investigation of the crime for which the defendant was charged. *Id.* at 38-39, 68-69, 124 S.Ct. 1354. The Supreme Court held that the defendant's confrontation rights were violated by admission of his wife's tape-recorded statement because the statement was "testimonial" in nature and the wife did not testify at trial. *Id.* Although the Supreme Court in *Crawford* declined to provide a comprehensive definition of the term "testimonial," the Court indicated that some statements would always be categorized as "testimonial," including ex parte testimony given at a preliminary hearing and statements taken by police officers during the course of a police interrogation. *Id.* at 52, 68, 124 S.Ct. 1354.

In *Davis,* the Supreme Court revisited the definition of "testimonial" hearsay. The Court held that:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there

> is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

547 U.S. at 822, 126 S.Ct. at 2273-74.

In *Davis,* the Court considered two separate situations in which the statements of a witness, who did not testify at trial, were admitted in evidence concerning a defendant's illegal conduct. *Id.,* 547 U.S. at 817-22, 126 S.Ct. at 2271-73. In the first situation, the Court held that statements made to law enforcement personnel during a "911" emergency telephone call were not "testimonial" in nature because the purpose of the statements was to elicit assistance during an ongoing emergency. *Id.* at 828, 126 S.Ct. at 2277. The Court reasoned that the speaker was not "acting as a witness" or "testifying" because, unlike a witness, she was describing events "as they were actually happening, rather than describ[ing] past events." *Id.* at 827-28, 126 S.Ct. at 2276-77 (emphasis and internal quotation marks omitted).

The second situation in *Davis* concerned statements recorded in an affidavit obtained by police following a domestic dispute. *Id.,* 547 U.S. at 819-22, 126 S.Ct. at 2272-73. The Court concluded that these statements were "testimonial" in character because the declarant's purpose in making the statements was not to describe an ongoing emergency situation, but to supply information in a police investigation about past criminal conduct. *Davis,* 547 U.S. at

829-30, 126 S.Ct. at 2278. The Court concluded that the statements were "inherently testimonial" because they were "an obvious substitute for live testimony," and they did "precisely what a witness does on direct examination." *Id.* (emphasis omitted).

Based on the holdings in *Davis* and *Crawford,* I would conclude that a certificate of drug analysis, in function, "acts as a witness" against an accused. *See Davis,* 547 U.S. at 828, 126 S.Ct. at 2277; *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354. Much like any other expert witness, the scientist preparing a certificate of analysis does so based on a factual foundation supplied from past events. *See Santen v. Tuthill,* 265 Va. 492, 498, 578 S.E.2d 788, 792 (2003); *Countryside Corp. v. Taylor,* 263 Va. 549, 553, 561 S.E.2d 680, 682 (2002). Thus, the certificate admitted under Code § 19.2-187.1 functions in the same manner as expert witness testimony because the certificate describes the scientist's procedures and conclusions concerning the material submitted for analysis. *See Thomas v. United States,* 914 A.2d 1, 12-13 (D.C.App.2006).

The holding in *Davis* further reinforces the "testimonial" nature of a certificate of analysis, because the certificate is created "to establish or prove past events potentially relevant to later criminal prosecution." *See Davis,* 547 U.S. at 822, 126 S.Ct. at 2274; *Thomas,* 914 A.2d at 12-13; *Belvin v. State,* 922 So.2d 1046, 1050-51 (Fla.Dist.Ct.App.2006). A forensic scientist prepares the certificates in these cases for the purpose of proving a critical element of a criminal offense, namely, that the chemical sample submitted

for analysis is an illegal substance. *See Davis,* 547 U.S. at 822-27, 126 S.Ct. at 2274-76; *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354; *Commonwealth v. Allen,* 269 Va. 262, 274, 609 S.E.2d 4, 12 (2005); *Santen,* 265 Va. at 498, 578 S.E.2d at 792; *Countryside Corp.,* 263 Va. at 553, 561 S.E.2d at 682; *Thomas,* 914 A.2d at 12-13; *Belvin,* 922 So.2d 1046, 1050-51; *State v. Laturner,* 38 Kan.App.2d 193, 163 P.3d 367, 376-77 (2007); *State v. March,* 216 S.W.3d 663, 666 (Mo.2007); *State v. Miller,* 208 Or.App. 424, 144 P.3d 1052, 1058 (2006). In the parlance of *Davis,* the certificates of analysis in the present cases functioned as "an obvious substitute for live testimony," because the Commonwealth introduced them in lieu of the scientists' testimony, and otherwise would have been required to establish the illegal nature of the substances by presenting actual testimony from the scientists themselves. *See Davis,* 547 U.S. at 829-30, 126 S.Ct. at 2278; *Thomas,* 914 A.2d at 12-13; *State v. Caulfield,* 722 N.W.2d 304, 309 (Minn.2006); *March,* 216 S.W.3d at 666; *State v. Berezansky,* 386 N.J.Super. 84, 899 A.2d 306, 312 (App.Div.2006).

Applying additional rationale employed by the Supreme Court in *Davis,* I also observe that the forensic scientists' analyses were not performed under circumstances of an emergency or contemporaneously with the commission of the crimes, but were accomplished well after the criminal events had transpired. *See Davis,* 547 U.S. at 826-30, 126 S.Ct. at 2276-77, 2278; *Thomas,* 914 A.2d at 12-13; *Hinojos-Mendoza v. People,* 169 P.3d 662, 667 (Colo.2007); *Caulfield,* 722

N.W.2d at 309; *March,* 216 S.W.3d at 666; *Berezansky,* 899 A.2d at 312; *City of Las Vegas v. Walsh,* 121 Nev. 899, 124 P.3d 203, 208 (2005); *People v. Rogers,* 8 A.D.3d 888, 780 N.Y.S.2d 393, 397 (N.Y.App.Div.2004); *Miller,* 144 P.3d at 1060. In fact, the scientists prepared the certificates in response to police investigations. *See Davis,* 547 U.S. at 826-33, 126 S.Ct. at 2276-79; *Crawford,* 541 U.S. at 52, 68, 124 S.Ct. 1354; *Thomas,* 914 A.2d at 12-13; *Hinojos-Mendoza,* 169 P.3d at 667.

Moreover, the certificates fall into the category of "formalized testimonial materials, such as affidavits," which the Supreme Court in *Crawford* included in its examples of the types of statements that would be considered testimonial. *See Crawford,* 541 U.S. at 51-52, 124 S.Ct. 1354. The certificates contain a "solemn declaration or affirmation" by the forensic scientists who prepared them, in conformance with the requirement of Code § 19.2-187 that such certificates be "duly attested" before being admitted in evidence. *See id.,* 541 U.S. at 51, 124 S.Ct. 1354.

Based on the holdings in *Davis* and *Crawford,* I would conclude that the certificates of analysis admitted in evidence in the present cases served to "bear testimony" against the defendants and, therefore, were "testimonial" evidence within the meaning of those holdings. I would further conclude that the defendants in these cases had a Sixth Amendment right to be confronted with the testimony of the forensic scientists who prepared the certificates, because the Commonwealth failed to

demonstrate that the scientists were unavailable or that the defendants had a prior opportunity to cross-examine them. *See Crawford,* 541 U.S. at 68, 124 S.Ct. 1354.*

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* In reaching this conclusion, I recognize that courts in various jurisdictions have reached differing results in deciding the question whether certificates of scientific analysis are "testimonial" in character, within the meaning of *Davis* and *Crawford. Compare, Thomas v. United States,* 914 A.2d 1, 12-13 (D.C.App.2006) (holding that chemist's report was testimonial because it was akin to expert report and primary purpose was to substitute for chemist's testimony in prosecution of accused); *Hinojos-Mendoza v. People,* 169 P.3d 662, 665-66 (Colo.2007) (holding that laboratory report was testimonial because it was prepared at direction of police, solely for purposes of prosecution, and introduced in evidence to establish element of offense); *Martin v. State,* 936 So.2d 1190, 1192 (Fla.Dist.Ct.App.2006) (holding that drug certificate was testimonial because it was created for criminal prosecution); *Belvin v. State,* 922 So.2d 1046, 1050 (Fla.Dist.Ct.App.2006) (deciding that breath test affidavits were testimonial because they were generated by law enforcement for later use at criminal trial); *State v. Laturner,* 38 Kan.App.2d 193, 163 P.3d 367, 376-77 (2007) (holding that laboratory report was testimonial because scientist was witness, statements in report were testimony, and scientist knew statements would be used in later trial against accused); *People v. Lonsby,* 268 Mich.App. 375, 707 N.W.2d 610, 619-21 (2005) (concluding that crime lab report was testimonial because person preparing report would reasonably expect it to be used in prosecution); *State v. Caulfield,* 722 N.W.2d 304, 309 (Minn.2006) (deciding that laboratory report was testimonial because analyst attested to findings, report was equivalent of testimony, and report was prepared at police request for purpose of prosecution); *State v. March,* 216 S.W.3d 663, 666 (Mo.2007) (holding that laboratory report was testimonial because it was prepared at request of law enforcement, created for purposes of prosecution, intended to prove element of offense, and offered in

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lieu of testimony); *State v. Berezansky*, 386 N.J.Super. 84, 899 A.2d 306, 312 (App.Div.2006) (concluding that blood test analysis was testimonial because it was prepared to prove element of offense in lieu of calling technician to testify); *City of Las Vegas v. Walsh*, 121 Nev. 899, 124 P.3d 203, 208 (2005) (holding that nurse's affidavit stating name, time, and manner of blood withdrawal was testimonial because it was made for later use at trial); *People v. Rogers*, 8 A.D.3d 888, 780 N.Y.S.2d 393, 396-97 (N.Y.App.Div.2004) (holding that blood test report was testimonial because it was initiated by prosecution to discover evidence against the accused); *State v. Crager*, 164 Ohio App.3d 816, 844 N.E.2d 390, 396 (2005) (holding that DNA analysis was testimonial because it was prepared as part of police investigation and reasonable people would conclude that report would later be used at trial); *State v. Miller*, 208 Or.App. 424, 144 P.3d 1052, 1058 (2006) (concluding that laboratory report was testimonial because it contained solemn declarations produced in response to police inquiry for purpose of establishing critical element at later criminal prosecution); *Deener v. State*, 214 S.W.3d 522, 526 (Tex.Ct.App.2006) (deciding that certificates of analysis were core testimonial evidence); *with, United States v. Washington*, 498 F.3d 225, 230-32 (4th Cir.2007) (holding that report of data analyzing blood sample was not testimonial statement of lab technician because statement was generated by machine); *United States v. Ellis*, 460 F.3d 920, 926-27 (7th Cir.2006) (holding that certificates of blood and urine analysis were non-testimonial even though person creating records knew records may be used for criminal prosecution, because records were created in ordinary course of business and technicians were not testifying and were not acting as witnesses); *Pruitt v. State*, 954 So.2d 611, 617 (Ala.Crim.App.2006) (concluding that certificate of analysis was non-testimonial because it was created by inherently trustworthy and reliable scientific testing rather than opinionated assertions, speculation, or guesswork); *Bohsancurt v. Eisenberg*, 212 Ariz. 182, 129 P.3d 471, 475-78 (Ct.App.2006) (holding that record of regular testing of breathalyzer equipment was non-testimonial business record because it was kept in ordinary course of business and not for purposes of litigation); *People v.*

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II. VIOLATION OF CONFRONTATION CLAUSE RIGHTS

I would further hold that the defendants' Confrontation Clause rights were violated when the certificates of analysis were admitted in evidence under Code § 19.2-187. The Confrontation Clause is worded in the passive, rather than in the active, voice. *See* U.S. Const., amend. VI. Thus, under that constitutional guarantee, an accused enjoys the right

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Geier, 41 Cal.4th 555, 61 Cal.Rptr.3d 580, 161 P.3d 104, 140 (Ca.2007) (concluding that DNA report was not testimonial because observations in report were contemporaneous recordations rather than documentation of past events); *People v. Johnson,* 121 Cal.App.4th 1409, 18 Cal.Rptr.3d 230, 233 (2004) (deciding that laboratory report was not testimonial because it did not function as equivalent of in-court testimony); *State v. Musser,* 721 N.W.2d 734, 753-54 (Iowa 2006) (stating that HIV test performed two years prior to trial and not for purposes of prosecution was non-testimonial); *Commonwealth v. Verde,* 444 Mass. 279, 827 N.E.2d 701, 705 (2005) (holding that laboratory report was merely report of scientific data and therefore was non-testimonial business record); *Rollins v. State,* 392 Md. 455, 897 A.2d 821, 837-46 (2006) (concluding that factual, routine, and non-analytical findings in autopsy report were non-testimonial); *State v. Forte,* 360 N.C. 427, 629 S.E.2d 137, 144 (2006) (holding that blood sample analysis was not testimonial because it did not "bear witness" against accused and was not prepared exclusively for trial); *State v. Dedman,* 136 N.M. 561, 102 P.3d 628, 635-36 (N.M.2004) (concluding that blood alcohol report was not testimonial because not prepared for purpose of prosecution); *Commonwealth v. Carter,* 593 Pa. 562, 932 A.2d 1261, 1268 (2007) (holding that blood alcohol tests were not testimonial because they were basic, routine, and contained precise calculations).

"to be confronted" by the prosecution with the witnesses against him. *Id.*

As the majority correctly observes, the Sixth Amendment confrontation right has long been held to include a defendant's "opportunity for effective cross-examination." *See United States v. Owens,* 484 U.S. 554, 559-60, 108 S.Ct. 838, 98 L.Ed.2d 951 (1988) (quoting *Kentucky v. Stincer,* 482 U.S. 730, 739, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987)); *Pointer v. Texas,* 380 U.S. 400, 404, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Mattox v. United States,* 156 U.S. 237, 242-43, 15 S.Ct. 337, 39 L.Ed. 409 (1895). This opportunity is "one of the safe-guards essential to a fair trial," and is "a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution." *Pointer,* 380 U.S. at 404, 85 S.Ct. 1065 (quoting *Kirby v. United States,* 174 U.S. 47, 55-56, 19 S.Ct. 574, 43 L.Ed. 890 (1899); and *Alford v. United States,* 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624 (1931)). The Confrontation Clause "ensure[s] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings." *State v. Craig,* 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990).

This Court consistently has recognized that in criminal trials, the Confrontation Clause preserves for a defendant the right to cross-examine prosecution witnesses. *See Bilokur v. Commonwealth,* 221 Va. 467, 470, 270 S.E.2d 747, 750 (1980); *Moore v.*

Commonwealth, 202 Va. 667, 669, 119 S.E.2d 324, 327 (1961). The opportunity for effective cross-examination of prosecution witnesses, however, presupposes that a defendant has an opportunity to cross-examine those witnesses during the prosecution's case. Thus, preservation of the Sixth Amendment confrontation right requires that the prosecution call a defendant's accusers as witnesses to actively confront the defendant. *See Owens,* 484 U.S. at 557, 559, 108 S.Ct. 838; *Kirby,* 174 U.S. at 55-56, 19 S.Ct. 574; *Thomas,* 914 A.2d at 16; *Lowery v. Collins,* 988 F.2d 1364, 1369-70 (5th Cir.1993); *State v. Snowden,* 385 Md. 64, 867 A.2d 314, 332-33 & n. 23 (2005).

Code § 19.2-187 forces a defendant to relinquish his right "to be confronted" in the prosecution's case in chief, because the statute permits a timely-filed certificate of analysis to be admitted automatically in the absence of testimony from the scientist who prepared the certificate. *See id.* That statute allows admission of the certificate irrespective whether a defendant chooses to call the forensic scientist to testify in his own case under the provisions of Code § 19.2-187.1. Thus, I would conclude that a Confrontation Clause violation occurred in the present cases because the defendants were not able to subject the contents of the certificates of analysis to adversarial scrutiny before the prosecution concluded its cases in chief.

III. WAIVER INAPPLICABLE

The provisions of Code § 19.2-187.1 did not remedy this Confrontation Clause violation. That section provides a criminal defendant the statutory right to call the forensic scientist who prepared a certificate of analysis as a witness in the defendant's own case. *See id.* Thus, Code § 19.2-187.1 merely provides a criminal defendant the opportunity to seek evidence in his favor by questioning the scientist who prepared the certificate that has already been admitted in evidence against him.

The majority asserts, however, that the present cases are analogous to other situations in which we have held that criminal defendants are required to take "certain procedural steps" in order to preserve their constitutional rights. In my opinion, this argument misconstrues the very nature of Code § 19.2-187.1. No "procedural step" under Code § 19.2-187.1 will preserve a defendant's Sixth Amendment confrontation right, because that section merely establishes a separate, statutory right for a defendant to call the forensic scientist as a witness in a defendant's own case. Thus, Code § 19.2-187.1 does not impact a defendant's Sixth Amendment right "to be confronted" by the witnesses against him, because the statute cannot revive a defendant's right to be confronted by the prosecution with the scientist's evidence. *See Belvin*, 922 So.2d at 1054; *State v. Birchfield*, 342 Or. 624, 157 P.3d 216, 220 (2007).

The majority seeks to avoid this dilemma by stating that the defendants failed to raise a due process challenge alleging that Code § 19.2-187.1 impermissibly shifted the burden of producing evidence to the defendants, which is a claim not cognizable under the Sixth Amendment. This argument, however, is unavailing because the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights.

A defendant's constitutional right to be confronted with the witnesses against him arises automatically, and the state may not require a defendant to take an affirmative action to preserve this right. *See Taylor v. Illinois,* 484 U.S. 400, 410, & n. 14, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988); *People v. McClanahan,* 191 Ill.2d 127, 246 Ill.Dec. 97, 729 N.E.2d 470, 475 (2000); *Birchfield,* 157 P.3d at 219-20. While a defendant's failure to act under Code § 19.2-187.1 may constitute a waiver of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right that is guaranteed to him throughout his criminal trial. *See City of S. Boston v. Halifax County,* 247 Va. 277, 282, 441

S.E.2d 11, 14 (1994); *Thomas,* 914 A.2d at 16; *Collins,* 988 F.2d at 1369-70; *Snowden,* 867 A.2d at 332-33.

A defendant cannot waive a right that he has already been denied. The extent of a defendant's waiver of a right under Code § 19.2-187.1 necessarily is limited to rights he possesses under the statute. *See Barber v. Page,* 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968); *Brookhart v. Janis,* 384 U.S. 1, 4, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966); *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Thus, the defendants in these cases could not have waived under Code § 19.2-187.1 rights that had already been denied by operation of Code § 19.2-187.

Even if the majority were correct, however, that Code § 19.2-187.1 offers a defendant the protection of a confrontation right, the record does not support a conclusion that these defendants waived that right. A waiver of a constitutional right requires a clear showing that there was an "intentional relinquishment or abandonment of a known right or privilege." *Barber,* 390 U.S. at 725, 88 S.Ct. 1318; *Brookhart,* 384 U.S. at 4, 86 S.Ct. 1245; *Zerbst,* 304 U.S. at 464, 58 S.Ct. 1019; *Allen v. Commonwealth,* 252 Va. 105, 111, 472 S.E.2d 277, 280 (1996). The record fails to establish a "knowing and intelligent" waiver under Code § 19.1-187.1 because that Code section does not provide a defendant with notice that if he fails to avail himself of the statute's provisions, he waives his Sixth Amendment right. *See Brookhart,* 384 U.S. at 4, 86 S.Ct. 1245. This Court should not presume a

defendant's waiver of his Confrontation Clause rights from a silent record. *See Boykin,* 395 U.S. at 242, 89 S.Ct. 1709; *Laturner,* 163 P.3d at 377; *cf. Barber,* 390 U.S. at 725, 88 S.Ct. 1318.

I would hold that a constitutional application of Code § 19.2-187 requires that if the prosecution wishes to introduce in evidence a certificate of analysis contemplated by Code § 19.2-187, the prosecution must obtain from a defendant a stipulation regarding the admissibility of the contents of that certificate, or an affirmative waiver by a defendant of his Confrontation Clause rights regarding the certificate. In the absence of such a stipulation or affirmative waiver, the Sixth Amendment requires that the prosecution call in its case in chief the forensic scientist who prepared the certificate to present this "testimonial" evidence. *See Davis,* 547 U.S. at 828-29, 126 S.Ct. at 2277; *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354; *Boykin,* 395 U.S. at 243, 89 S.Ct. 1709; *Laturner,* 163 P.3d at 377; *cf. Barber,* 390 U.S. at 725, 88 S.Ct. 1318. Because there were no such affirmative waivers or stipulations in the cases before us, and the forensic scientists did not testify regarding the contents of the certificates in the prosecution's cases in chief, I would hold that the certificates of analysis in these cases were admitted in violation of the defendants' Confrontation Clause rights. Therefore, I would reverse the defendants' convictions and remand the cases for new trials, if the Commonwealth be so advised.

Order of the Supreme Court of the United States Granting In Forma Pauperis Status and Certiorari

Supreme Court of the United States
(Order List 557 U.S.) Monday, June 29, 2009

* * *

CERTIORARI GRANTED

07-11191 BRISCOE, MARK A., ET AL. V. VIRGINIA

The motion of petitioners for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

* * *

PETITIONER'S BRIEF

Supreme Court, U.S.
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No. 07-11191

In The
Supreme Court of the United States

MARK A. BRISCOE and SHELDON A. CYPRESS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

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QUESTION PRESENTED

If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. *MELENDEZ-DIAZ* CLEARLY RESOLVES THE QUESTION PRESENTED IN THIS CASE, RENDERING VIRGINIA'S SUBPOENA PROCEDURE UNCONSTITUTIONAL	10
II. VIRGINIA'S SUBPOENA PROCEDURE POSES A FUNDAMENTAL THREAT TO THE CONFRONTATION RIGHT	13
III. VIRGINIA'S SUBPOENA SYSTEM WAS NOT NECESSARY TO PREVENT GRATUITOUS EXPENSE	29
CONCLUSION	36

APPENDIX

A. RELEVANT PORTIONS OF VIRGINIA CODE	App. 1
B. MICHIGAN DRUG PROSECUTIONS: PRESENTATION OF LAB ANALYSES	App. 8

TABLE OF AUTHORITIES

Page

CASES

Crawford v. Washington, 541 U.S. 36 (2004) 3, 11, 17, 29

Davis v. Washington, 547 U.S. 813 (2006) 11

Ellis v. Commonwealth, 414 S.E.2d 615 (Va.App. 1992) 23

Gray v. Commonwealth, 265 S.E.2d 705 (Va. 1980) 18

Hoover v. Beto, 439 F.2d 913 (5th Cir. 1971) 27

Lowery v. Collins, 988 F.2d 1364 (5th Cir. 1993) ... 20, 24

Lowery v. Collins, 996 F.2d 770 (5th Cir. 1993) (on rehearing) 27

Lowrey v. State, 757 S.W.2d 358 (Tex.Crim.App. 1988) 20

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) ..... *passim*

New York Life Ins. Co. v. Taylor, 147 F.2d 297 (D.C. Cir. 1944) 15

Ohio v. Roberts, 448 U.S. 56 (1980) 9, 29

People v. Dungo, 2009 WL 2596892 (Cal. App. 3rd App. Dist. Aug. 24, 2009) 28

Reardon v. Manson, 806 F.2d 39 (2d Cir. 1986) 22

Schaal v. Gammon, 233 F.3d 1103 (8th Cir. 2000) 27, 28

State v. Birchfield, 157 P.3d 220 (Or. 2007) 15

TABLE OF AUTHORITIES – Continued

Page

State v. Rohrich, 939 P.2d 697 (Wash. 1997) 27

State v. Saporen, 285 N.W. 898 (Minn. 1939).....18

State v. Simbara, 811 A.2d 448 (N.J. 2002).....32

State v. Snowden, 867 A.2d 314 (Md. 2005).....14, 24, 27

Taylor v. Illinois, 484 U.S. 400 (1988) 15

Thomas v. United States, 914 A.2d 1 (D.C. 2006) 14, 24

Waller v. Commonwealth, 1997 WL 457476 (Va.App. 1997) 23

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. VI .....*passim*

U.S. Const., amend. XIV 3

STATUTES

28 U.S.C. § 1257(a) 1

Va. Act of Assembly, 2009 Spec. Sess. I, Ch. 1, Aug. 21, 2009.....31

Va. Code § 19.2-187 *et seq*.....*passim*

COURT RULES

Federal Rules of Evidence Rule 611 26

Federal Rules of Evidence Rule 803(6).....25

Federal Rules of Evidence Rule 803(8).....25

TABLE OF AUTHORITIES – Continued

Page

Federal Rules of Evidence Rule 807 25

Mass. R. Crim. P. 17(b).....10, 13

BOOKS AND ARTICLES

Janeen Kerper, *The Art and Ethics of Direct Examination*, 22 AM. J. TRIAL ADVOC. 377, 411 (1998).....20, 21

WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2007).....13

EDGAR LUSTGARTEN, VERDICT IN DISPUTE (1950).....22

Note, *Right of Confrontation: Admission of Declaration by Co-Conspirator*, 85 HARV. L. REV. 188 (1971).....19

Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 578-79 (1978).....19

Irving Younger, *The Art of Cross-Examination*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, MONOGRAPH SERIES, No. 1 (1975).....21

OTHER AUTHORITIES

City of Philadelphia District Attorney's Office, *About Us*, <http://www.phila.gov/districtattorney/AboutUs/about.html> 35

CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA (4th ed. rev. 2004).....14

TABLE OF AUTHORITIES – Continued

Page

Philadelphia Police Department, *Department History*, <http://www.ppdonline.org/hq_history.php> 34

Texas Department of Public Safety, Criminal Law Enforcement Division, Crime Laboratory Service, Forensic Testing Services, *Drug Analysis Section*, <http://www.txdps.state.tx.us/criminal_law_enforcement/crime_laboratory/clabforensictesting/clabdruganalysis.htm> 32

Transcript of Oral Argument, *Melendez-Diaz v. United States*, No. 07-591 (U.S.S.C. Nov. 10, 2008) 11

OPINIONS BELOW

The opinion and dissent of the Supreme Court of Virginia (Joint Appendix ("JA") 182-233) are published at 275 Va. 283, 657 S.E.2d 113 (Va. 2008). The opinions of the Virginia Court of Appeals (JA 75-83 (Briscoe), JA 176-81 (Cypress)) are unpublished, as are the relevant rulings of the Circuit Court of the City of Alexandria (JA 68-74 (Briscoe)) and the Circuit Court of the City of Chesapeake (JA 169-75 (Cypress)).

JURISDICTION

The Supreme Court of Virginia issued its decision in this case on February 29, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him [and] to have compulsory process for obtaining witnesses in his favor."

This case concerns a system of Virginia statutes as it stood until August 21, 2009. Virginia Code § 19.2-187 provided that in a criminal trial, in

prescribed circumstances, certain certificates of analysis reporting the results of laboratory analysis "shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein."

Virginia Code § 19.2-187.01, which has not been amended, provided that certain reports of laboratory analysis "shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination."

Virginia Code § 19.2-187.1 provided in relevant part:

> The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 . . . shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

Relevant portions of these statutes, and of the new forms of §§ 19.2-187 and 19.2-187.1, enacted August 21, 2009, are set forth in Section A of the Appendix to this brief.

STATEMENT OF THE CASE

Under the statutory scheme involved in this case, a prosecutor could introduce a certificate of the results of a forensic laboratory test, without producing the live testimony of the analyst who performed the test, or indeed of any other witness who could testify about the conduct of the test or the chain of custody of the materials tested. The Supreme Court of Virginia did not deny a point since established by *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), that such certificates are testimonial in nature within the meaning of *Crawford v. Washington*, 541 U.S. 36 (2004). Nevertheless, it held that admission of the certificates in prosecuting the petitioners was acceptable because of another portion of the statutory scheme, which explicitly gave the accused the right to call the analyst, or a person "involved in the chain of custody," as his own witness at trial, at the expense of the Commonwealth.[1] The question presented is whether such a burden-shifting scheme violates the Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment.

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[1] Although this statutory scheme has since been amended, in response to *Melendez-Diaz*, it will, for the most part, be simpler to discuss the case without reference to the fact of amendment; in particular, § 197.2-187.01, which allowed the prosecutors in these cases to prove chain of custody without the need for live testimony, remains unchanged.

Each of these cases fits the same pattern: The petitioner was tried on charges related to the distribution of cocaine. At trial, the key question was whether substances seized by the police (from Briscoe's apartment and from a car in which Cypress was a passenger) contained cocaine, and if so how much. The principal evidence against the petitioner was a certificate of analysis (two in Briscoe's case) prepared by a forensic analyst of the Commonwealth's Department of Criminal Justice Services, Division of Forensic Science. The certificate reported test results purporting to show that the seized substances contained large quantities of cocaine (a total of 36.578 grams in Briscoe's case, JA 4-7, and 60.5 grams of cocaine hydrochloride, JA 84-87 – a "very pure" form of cocaine, indicative of possession for distribution rather than personal use, JA 132 – in Cypress's case). The petitioner objected to introduction of the certificate, contending that it would violate the Confrontation Clause. JA 31-43, 50 (Briscoe), JA 105-11, 113-14, 145-50 (Cypress). The trial court overruled the objection and admitted the certificate. JA 46-49, 51 (Briscoe), JA 112-13, 114, 151-52 (Cypress). The petitioner declined to call the analyst as his own witness, nor did he present any other evidence. The petitioner was convicted, and was sentenced to a lengthy term of imprisonment (20 years, with 14 years, 4 months suspended for Briscoe; 15 years, with 10 years suspended, plus a fine of $1,000, for Cypress). The Court of Appeals affirmed, JA 75-83 (Briscoe), JA 176-81 (Cypress), and the petitioner then appealed to the Supreme Court of Virginia.

The appeals of these two petitioners were consolidated in that court with one other similar appeal. By a 4-3 vote, the court affirmed all three convictions. *Magruder v. Commonwealth*, 657 S.E.2d 113, 275 Va. 283 (2008), JA 182-233. The majority put aside the question whether the certificates are testimonial in nature. JA 194. Nevertheless, it squarely held that Virginia's statutory scheme does not violate the Confrontation Clause:

> Because the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause and because the defendants in these appeals failed to utilize that procedure, we conclude that they waived the challenges under the Confrontation Clause to the admissibility of the certificates of analysis.

JA 183. In the course of its discussion, the majority addressed directly and bluntly rejected the contention

> that the statutory procedure, by its terms, shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront that witness.

"This argument," the majority said, "is not cognizable under the Confrontation Clause." JA 204.[2]

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[2] The majority also said that the defense contention raised due process concerns that were not properly before the court because no defendant subpoenaed the analyst and then said that

(Continued on following page)

On May 29, 2008, petitioners filed their petition for *certiorari* in this Court. They suggested that the case be held pending the decision in *Melendez-Diaz*, *supra*, which presented the underlying issue of whether forensic laboratory reports are testimonial; if the Court had decided that question in the negative, there would have been no basis for granting the petition in this case. The Court did hold the petition.

In litigating the *Melendez-Diaz* case in this Court, Massachusetts contended, among other points, that introduction of a forensic laboratory report against a criminal defendant did not violate the Confrontation Clause because the defendant had a right, under the Compulsory Process Clause of the Sixth Amendment and under state-law procedures, to produce the author as his own witness.

On June 25, 2009, this Court issued its decision in *Melendez-Diaz*. The Court's principal holding was that the laboratory reports were testimonial for purposes of the Confrontation Clause. In the course of its analysis, the Court also explicitly held that the

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the analyst could not testify unless the Commonwealth called him. JA 205. Whatever the merits of this avoidance argument, *see* JA 231 (Keenan, J., dissenting) ("the majority confuses the issue whether a defendant may be required to produce evidence in a criminal trial with the issue whether the statutory mechanism at issue in this case, which requires a defendant to produce evidence, is capable of preserving his Confrontation Clause rights"), it is irrelevant to petitioners' Confrontation Clause contention, which the court indisputably considered and rejected.

accused's "ability to subpoena the analysts . . . – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation." 129 S.Ct. at 2540.

On June 29, 2009, the Court granted the petition for *certiorari* in this case.

SUMMARY OF ARGUMENT

In one sense, this case is very simple: *Melendez-Diaz* clearly demands that the decision of the Supreme Court of Virginia be reversed, because Virginia's subpoena procedure is blatantly unconstitutional. On the other hand, affirming the decision of the Virginia court would pose a fundamental threat to the confrontation right – immediately, within the context of forensic laboratory reports, and ultimately in general.

Melendez-Diaz held that a forensic laboratory report is testimonial for purposes of the Confrontation Clause. In response to a contention made by Massachusetts, it also held that the ability of the accused to subpoena the author of the report does not satisfy the confrontation right: If the state wishes to prove the contents of the report, then, unless the defendant waives the right, *the state* must produce a live witness who is able to testify to those contents from first-hand knowledge.

Compelling reasons support this holding. As *Melendez-Diaz* pointed out, a subpoena system like Virginia's shifts to the accused the risk that a competent witness will not appear to testify at trial; it thus provides no guarantee that the accused will have any opportunity for confrontation at all.

But even assuming the accused were able to secure the presence of the author of the report, or another competent witness, Virginia's former subpoena procedure is constitutionally inadequate. As *Melendez-Diaz* held, the burden imposed by the Confrontation Clause is on the prosecution, to present its witnesses – not on the defense to present adverse witnesses. The Clause is worded in passive terms, which reflects the stark difference between the confrontation right and the active right granted by the Compulsory Process Clause. And the difference has immense practical significance. As compared to the right to cross-examine a witness called by the prosecution, the opportunity to call that person to the witness stand is, for several reasons, of little value. It entails significantly greater risks and costs, and as a result is rarely invoked. Petitioners did not waive the confrontation right by failing to invoke this inferior alternative.

Ensuring the accused his right to be confronted with this particular type of adverse witness does not entail intolerable costs. Empirical evidence indicates that if the prosecution seeks a stipulation allowing admissibility of a lab report the defense will most often comply. A state eager to take all opportunities to

reduce expense can adopt other procedures, including statutes that treat the confrontation right as waived unless the accused makes an affirmative pre-trial demand that the prosecution produce the analyst. Some forms of such statutes are plainly constitutional, and indeed *Melendez-Diaz* explicitly endorses their validity. The Commonwealth has, since the grant of *certiorari* in this case, adopted such a statute.

If, however, this Court affirms the decision of the Supreme Court of Virginia, it would severely vitiate the confrontation right, and not only in the context of certificates of forensic laboratory reports. There would be no principled basis – short of re-estabishing a regime like the rejected one of *Ohio v. Roberts*, 448 U.S. 56 (1980) – of limiting the constitutionality of Virginia's subpoena procedure to one particular species of statement. Given that, as *Melendez-Diaz* holds, the certificates here are testimonial, the same procedure could be applied to any other type of testimonial statement. The door would be open to a fundamental alteration of the centuries-old procedure of the criminal trial: Prosecutors could introduce affidavits or video-taped statements of witnesses and leave it to the defense to bring to the trial such of the prosecution witnesses as they dared to.

ARGUMENT

I. *MELENDEZ-DIAZ* CLEARLY RESOLVES THE QUESTION PRESENTED IN THIS CASE, RENDERING VIRGINIA'S SUBPOENA PROCEDURE UNCONSTITUTIONAL.

In *Melendez-Diaz*, as here, the prosecution had, pursuant to state procedure, introduced certificates of forensic laboratory reports without producing the analysts who performed the tests and prepared the reports. The question presented was "[w]hether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is 'testimonial' evidence" for purposes of the Confrontation Clause. Brief of Petitioner, at i. In resisting the conclusion that it had violated the Confrontation Clause, Massachusetts contended that, even if the report was testimonial, Melendez-Diaz had adequate opportunity to challenge the certificates and confront the analysts who prepared them. "Above all," the Commonwealth argued,

> Petitioner had the opportunity to compel the analysts' presence at trial and subject them to cross-examination. He could have obtained a subpoena pursuant to Mass. R. Crim. P. 17 or used his right to compulsory process, under both the state and federal constitutions, to compel the analysts to testify at trial. See art. 12 of the Massachusetts Declaration of Rights. Had Petitioner pursued these options for securing the analysts' presence at trial, he would have been able to cross-examine them in the same manner as

> if they had been called as part of the prosecution's case.

Brief of Respondent at 57. Melendez-Diaz answered this argument extensively in his reply brief, pp. 20-23, and it was discussed at some length at oral argument, Transcript at 7-10, 20 (questioning of petitioner's counsel), 48 (argument of respondent).

This Court squarely rejected the Commonwealth's contention. The Court decided that the analysts' reports were testimonial for Confrontation Clause purposes, and therefore that Melendez-Diaz had a right to be confronted with the analysts unless they were unavailable to testify at trial and he had a prior opportunity to cross-examine them. It then responded to what it aptly called, 129 S.Ct. at 2532-33, a "potpourri of analytic arguments" advanced against this "rather straightforward application" of *Crawford v. Washington*, 541 U.S. 36 (2004):

> Respondent asserts that we should find no Confrontation Clause violation in this case because petitioner had the ability to subpoena the analysts. But that power – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation. Unlike the Confrontation Clause, those provisions are of no use to the defendant when the witness is unavailable or simply refuses to appear. See, *e.g.*, *Davis* [v. *Washington*], 547 U.S. [813 (2006)], at 820, ("[The witness] was subpoenaed, but she did not appear at . . . trial"). Converting the prosecution's duty

> under the Confrontation Clause into the defendant's privilege under state law or the Compulsory Process Clause shifts the consequences of adverse-witness no-shows from the State to the accused. More fundamentally, the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court. Its value to the defendant is not replaced by a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses.

Id. at 2540.

The question presented by this case, therefore, has been definitively resolved by this Court, just last Term. There can be no doubt that the Court's statement on this issue was holding rather than dictum: The matter was briefed on both sides and argued, and the Court's conclusion was essential to the result in the case – had the Court accepted the contention by Massachusetts that the ability to subpoena the analysts was a full substitute for the right to be confronted with them, presumably the Court would have affirmed rather than reversed the decision of the Appeals Court of Massachusetts affirming the conviction.

Nor is there any plausible ground for distinguishing the procedure involved here from that of Massachusetts for purposes of the Confrontation

Clause. Under Virginia's statutory scheme, if the accused does present the analyst as a witness, he can examine her as a hostile witness, using leading questions – but, as Massachusetts emphasized to the Court in litigating *Melendez-Diaz*, the same is true under Massachusetts law. Brief of Respondent at 57 & n.21. Under Virginia's subpoena scheme, if the accused does decide to produce the analyst it is the Commonwealth that bears the expense. But that is not in itself significant; there is no suggestion in *Melendez-Diaz* that the result would have been different if the Commonwealth generally paid the costs of producing the witness – and the rule is universal that if the defendant is indigent (as these petitioners are), the state bears the cost of producing the witness. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE (3d ed. 2007) § 24.3(f); *see also, e.g.*, Mass. R. Crim. P. 17(b) (providing that if the defendant is indigent the expenses of producing defense witnesses shall be borne by the Commonwealth).

II. VIRGINIA'S SUBPOENA PROCEDURE POSES A FUNDAMENTAL THREAT TO THE CONFRONTATION RIGHT.

Melendez-Diaz resolves the question presented in this case as a matter of doctrine, but the point is also clear as a matter of principle: Virginia's subpoena procedure poses a fundamental threat to the confrontation right – immediately, within the context of forensic laboratory reports, and ultimately in general.

The Sixth Amendment gives the accused "the right . . . to *be confronted with* the witnesses against him." (Emphasis added.) The use of the passive voice in the Confrontation Clause is not adventitious. *Melendez-Diaz* emphasized the fundamental principle that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." 129 S.Ct. at 2540.[3] If the accused were forced to call adverse witnesses, "[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.'" *Thomas v. United States*, 914 A.2d 1, 17 (D.C. 2006), *quoting in part* CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA, Instruction No. 2.08 ("Burden of Proof-Presumption of Innocence") (4th ed. rev. 2004).

As this Court has made clear, the Confrontation Clause, governing the process for witnesses *against* the accused, stands in sharp contrast to the Compulsory Process Clause, which allows the accused to bring to trial witnesses "in his favor." The right

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[3] *See also Thomas v. United States*, 914 A.2d 1, 16 (D.C. 2006) ("This language, employing the passive voice, imposes a burden of production on the prosecution, not on the defense. *State v. Snowden*, 867 A.2d 314, 332 n.22 (Md. 2005) (rejecting the theory that the defendant could call his accusers to the stand because 'the burden of production . . . is placed on the State [by the Confrontation Clause] to produce affirmatively the witnesses needed for its prima facie showing of the defendant's guilt')."); *Magruder*, JA 227-28 (Keenan, J., dissenting).

accorded by the latter Clause "is dependent entirely on the defendant's initiative"; the confrontation right, however, like most of the others granted by the Sixth Amendment, "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case." *Taylor v. Illinois*, 484 U.S. 400, 410 (1988); *see also id.* at n.14; *accord, e.g., State v. Birchfield*, 157 P.3d 220 (Or. 2007) ("It is the state that seeks to adduce the evidence as to which the criminalist will testify. . . . The legislature may require the defendant to assert [the confrontation] right or to design a procedure to determine whether the defendant agrees that a written report will suffice. But, to require that a defendant do more changes the right to insist that the state present evidence the 'old-fashioned way' into an obligation to procure a witness for the state.").

The difference is not a mere theoretical nicety. It has immense practical significance, going to the essence of the criminal trial process – and that is true even if, as under Virginia's statutory scheme, the expense of bringing the witness to court is imposed on the prosecution and the accused may then ask leading questions. Even given those accommodations, it remains as true now as it did more than six decades ago that "[o]nly a lawyer without trial experience would suggest that the limited right to impeach one's own witness is the equivalent of that right to immediate cross-examination which has always been regarded as the greatest safeguard of American trial procedure." *New York Life Ins. Co. v. Taylor*, 147 F.2d

297, 305 (D.C. Cir. 1944) (Thurman Arnold, A.J.); *accord, e.g., Magruder*, JA 229 (Keenan, J., dissenting) ("The opportunity for effective cross-examination of prosecution witnesses . . . presupposes that a defendant has an opportunity to cross-examine those witnesses during the prosecution's case."). It is fanciful to suggest that the two opportunities are equivalent. It is therefore clear that petitioners did not waive the confrontation right; on the contrary, they vigorously demanded that they be accorded the right, and at most they waived the inferior opportunity Virginia offered them in lieu of the right.[4]

To see the difference between the constitutional right and the alternative offered by Virginia, compare the two basic scenarios at issue here. The first scenario is the one that, petitioners contend, is required by the Confrontation Clause, and so will here be labeled the Confrontation Scenario: The prosecution presents the live testimony of the lab technician, and defense counsel may then cross-examine. The second is the one provided by Virginia's statutory scheme, and will be labeled the Subpoena Scenario: The prosecution presents a certificate of the lab results and the accused may subpoena the technician to be a

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[4] *See Magruder*, JA 231 (Keenan, J., dissenting) ("While a defendant's failure to act under Code § 19.2-187.1 may constitute a waiver of his statutory right under that Code section to call the forensic scientist in the defendant's case, the fact that he chooses not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right that is guaranteed to him throughout his criminal trial.").

live witness as part of his case. The differences are numerous and critical.

One crucial difference, emphasized by *Melendez-Diaz*, is that Virginia's statutory scheme "shifts the consequences of adverse-witness no-shows from the State to the accused." 129 S.Ct. at 2540; *cf. id.* at 2550 (Kennedy, J., dissenting) (noting the possibilities that the analyst "may be ill; may be out of the country; may be unable to travel because of inclement weather; or may at that very moment be waiting outside some other courtroom . . . "). In the Confrontation Scenario, the accused is guaranteed the ability to cross-examine. The prosecution cannot present the witness's testimonial statement without producing the witness at trial (or another formal proceeding such as a deposition). Once the witness is on the stand, cross-examination follows immediately; if the witness should suddenly become unavailable before the accused has had an adequate opportunity for cross, the testimony would have to be stricken. *See Crawford, supra*, 541 U.S. at 68 (opportunity for cross held essential for admissibility of testimonial statement, even given unavailability of witness). In the Subpoena Scenario, by contrast, if the witness becomes unavailable after preparing the certificate and before trial, the accused is completely out of luck; the

certificate is admitted and the accused has no opportunity at all to examine the witness.[5]

Moreover, the tactical decisions facing defense counsel in the two scenarios are dramatically different, making a decision to examine the technician far riskier and less attractive in the Subpoena Scenario than in the Confrontation Scenario.

1. In the Confrontation Scenario, when defense counsel decides whether, and how, to examine the witness, the witness has just testified on direct.

In the Subpoena Scenario, by contrast, some time, perhaps substantial, has passed since the witness's (written) testimonial statement has been presented to the trier of fact, and presumably a much greater time since the witness made that statement. The time gap may be critical, as explained in the oft-quoted language of *State v. Saporen*, 285 N.W. 898, 901 (Minn. 1939):

> The chief merit of cross examination is not that at some future time it gives the party opponent the right to dissect adverse testimony. Its principal virtue is in its immediate

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[5] *See Gray v. Commonwealth*, 265 S.E.2d 705 (Va. 1980) (preparer of certificate being unavailable as a witness at trial, the failure of the Commonwealth to comply with the filing provisions of § 19.2-187 held fatal to admissibility – the implication being that had the Commonwealth filed in a timely manner the certificate would have been admissible notwithstanding the preparer's unavailability).

> application of the testing process. Its strokes fall while the iron is hot.

Accord, Peter Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 HARV. L. REV. 567, 578-79 (1978) ("Were the hearsay introduced as part of the prosecution's presentation, the jury might form an initial impression which the defense could not later counteract by examining the declarant in person once the state rested. . . . If such witnesses are to be examined at all about the truth of their statements, it should be the prosecution's duty to examine them in the first instance.").

2. In the Confrontation Scenario, immediately before cross-examination begins, the attention of the trier of fact is already focused on the testimony of the witness.

In the Subpoena Scenario, by contrast, to conduct examination of the technician the defense must in effect first remind the trier of fact of the adverse statement made by the witness. Note, *Right of Confrontation: Admission of Declaration by Co-Conspirator*, 85 HARV. L. REV. 188, 195 (1971) ("[E]ven a direct examination successful from the defendant's perspective is less effective than cross-examination because . . . the damaging hearsay will have to be repeated during the examination, thereby increasing its impact.").

3. In the Confrontation Scenario, given that the witness is already on the stand, the trier of fact will

not take it amiss that, at the conclusion of the prosecution's direct examination, defense counsel will in turn ask some questions.

In the Subpoena Scenario, by contrast, calling to the stand a witness whose statement has already been admitted may be annoying to the trier of fact and may appear to be harassment of the witness. *E.g.*, *Lowery v. Collins*, 988 F.2d 1364, 1369 (5th Cir. 1993) ("The State would . . . impermissibly impose on the defendant the Catch-22 . . . of either calling the child-complainant to the stand at the 'risk [of] inflaming the jury against [himself]' or avoiding the risk of thus inflaming the jury at the cost of waiving his constitutional right to confront and cross-examine the key witness against him.") (alteration in original) (footnote omitted) (*quoting Lowrey v. State*, 757 S.W.2d 358, 359 (Tex.Crim.App. 1988)).

4. In the Confrontation Scenario, defense examination of the technician will come in the middle of the prosecution's case.

In the Subpoena Scenario, by contrast, assuming the defense presents other evidence, it must disrupt its own case if it wishes to examine the technician, and give the prosecution an opportunity to examine a witness friendly to it in the middle of the defense case. Janeen Kerper, *The Art and Ethics of Direct Examination*, 22 AM. J. TRIAL ADVOC. 377, 411 (1998). To avoid giving too prominent a position to an adverse witness, the defense will probably find it best to adhere to the advice that, if one must present such a

witness, it is best to do so in the middle of one's case, rather than at the beginning or end. *Id.* And if the defense does *not* present other evidence, then the adverse witness will necessarily be *both* at the beginning and at the end of the defense case.

5. In the Confrontation Scenario, before the defendant begins to examine the witness, the prosecution has presumably already drawn from the witness all the information favorable to its case that it can, effectively setting up a target for cross-examination.

In the Subpoena Scenario, by contrast, the defense is shooting blind; it may know nothing about what the technician is likely to say other than what is contained in the report.

6. In the Confrontation Scenario, if the direct testimony has been harmful to the defense – as it almost certainly has been in the case of a lab technician – counsel will nearly always find it advantageous to ask at least a few questions on cross-examination, in an attempt to chip away where possible at the testimony and to introduce some element of doubt. *See* Irving Younger, *The Art of Cross-Examination*, AMERICAN BAR ASSOCIATION, SECTION OF LITIGATION, MONOGRAPH SERIES, No. 1 (1975), at 1 (before discussing "destructive cross-examination," noting that even in facing strong testimony counsel may find it

advantageous to conduct a brief cross-examination).[6] By taking small, careful steps, counsel can ensure that even disappointing answers do not create significant damage. *See* EDGAR LUSTGARTEN, VERDICT IN DISPUTE (1950), at 251 (describing a careful cross-examination, in which counsel "cannot foresee the terms of [the witness's] reply: "he needs to approach the question circumspectly, advancing only one step at a time, and at every stage leaving channels of escape which he can use without grave loss of face"). Accordingly, even the hope of modest gains will make the decision to cross-examine a sound one.

In the Subpoena Scenario, by contrast, by calling to the stand an adverse witness – and one whose written testimonial statement has already been admitted against the defendant – counsel inevitably raises expectations: Why would she do this unless she expects to make a major gain? Absent such a gain, she will look foolish, having wasted time and effort, her own and that of others, and done little but secured a re-affirmation of harmful testimony. Almost inevitably, the risk of failure will be so great that counsel will not dare take it. *See Reardon v. Manson*, 806 F.2d 39, 43 (2d Cir. 1986).[7]

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[6] *See infra* note 13 (presenting empirical evidence indicating that defense lawyers will almost always cross-examine a lab technician produced as a live witness by the prosecution).

[7] Petitioners examined all cases indicated by Westlaw's KeyCite tool that cited §§ 19.2-187 or 19.2-187.1. There were 59 cases – in some instances more than one involved in the same

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Petitioner Cypress's case provides a vivid illustration of the difference. The critical evidence against him was the certificate purporting to report a significant quantity of cocaine, in form suitable for use by a dealer, in the substances seized from the car. Given Virginia's statutory scheme, the Commonwealth had no need to present the live testimony of the author of the report, and the petitioner did not call the author to the stand. But the prosecution also presented another certificate, one indicating that no fingerprints had been found on the seized materials. Despite the Commonwealth's purported resistance on grounds of practicality to bringing in lab technicians, it did just that in that instance, so that the technician could explain that failure to recover fingerprints was not surprising. JA 122; Trial Transcript 52-55. Peripheral though this witness was to the case, defense counsel cross-examined him rather extensively, largely with respect to chain-of-custody issues that applied as well to the certificate reporting the presence of cocaine. JA 122-25.

7. In the Confrontation Scenario, defense counsel may cross-examine the technician and still decide not to present an affirmative case, relying instead on

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appeal – fitting this description. In each of these, the prosecutor had invoked § 19.2-187. In only two of the cases did the defense subpoena the person performing the chemical analysis to testify at trial. *Waller v. Commonwealth*, 1997 WL 457476 (Va.App. 1997); *Ellis v. Commonwealth*, 414 S.E.2d 615 (Va.App. 1992).

a clean, uncluttered argument that the prosecution has failed to satisfy its burden of persuasion.

In the Subpoena Scenario, by contrast, the defense is forced to elect – either decline to examine the technician, or abandon (or at least severely undercut) the burden-of-proof argument. *See, e.g., Thomas, supra*, 914 A.2d at 16 ("the 'available to the accused' theory of the Confrontation Clause is flawed because it 'unfairly requires the defendant to choose between his right to cross-examine a complaining [or other prosecution] witness and his right to rely on the State's burden of proof in a criminal case.' [*State v.*] *Snowden*, 867 A.2d [314 (Md. 2005),] at 332-33 (quoting *Lowery v. Collins*, 988 F.2d 1364, 1369-70 (5th Cir. 1993)).").

For all these reasons, subpoena schemes like Virginia's work a fundamental transformation in traditional criminal procedure within their scope of application. The effect is to turn the heart of the trial into a presentation of affidavits. To recognize fully the significance of the threat to criminal procedure that this poses, several considerations must be taken into account.

First, because forensic laboratory reports are such an essential part of the routine of modern criminal procedure, the question presented here arises many times every day.

Second, the Virginia statutory scheme is not limited to proving the *results* of a laboratory test. Section 19.2-187.01, which has not been amended,

applies to proof of the chain of custody of the tested materials – and it was used for that purpose here. JA 57-58 (Briscoe), JA 145-52 (Cypress). The chain of custody is not a triviality or technicality. On the contrary, it is a crucial aspect of the prosecution's case: Absent satisfactory proof that the materials that were the subject of the test reported in the testimony, and that they were not altered in any material respect, evidence of the test has no significant probative value.

Third, statutory authorization is not essential for a court to implement a subpoena system. If Virginia's system is valid, a prosecutor and a court could replicate it even absent a burden-shifting statute – as Massachusetts contended in *Melendez-Diaz* that its law did. The hearsay rule would not pose a serious obstacle; if the jurisdiction does not have a special-purpose hearsay exception to cover the certificate, then its exceptions for business and public records could easily do so, and if necessary the residual exception could be invoked. *Cf.* Fed. R. Evid. 803(6) (business records), 803(8) (public records), 807 (residual exception). The Compulsory Process Clause would in itself give the accused the right to subpoena the author of the certificate. If the defendant is indigent, state law would, as noted above, provide for payment by the state of the expenses of producing the witness. And, assuming no such law provided for payment of expenses in the circumstances of the case, the prosecutor could commit to pay those expenses if the accused decides to subpoena the witness, or the court

could make such a contingent commitment a condition of admissibility. Finally, given that the author would be a hostile witness, the court would presumably allow the accused to ask leading questions. *See supra* p. 13 (Massachusetts rule); *cf.* Fed. R. Evid. 611(c) (providing that "interrogation may be by leading questions" when a party calls a hostile witness). Thus, the resolution achieved by the pre-amendment form of Va. Code § 19.2-187.1 could be reached without need for a comparable statute – which means that the problem posed by the decision below in this case can arise in *any* state that does not affirmatively preclude it (as the new Virginia statutes appear to do, except perhaps to prove chain of custody), not just those that have provided by legislation for burden-shifting.

Fourth, and most importantly, if the principle accepted by the Supreme Court of Virginia – that the ability of the accused to call a witness as his own may substitute for the opportunity to cross-examine – is accepted in the context of laboratory reports, there is no sound basis on which to stop it from spreading to other contexts as well. That court explicitly declined to consider the problem, JA 211 n.5, perhaps because to do so would reveal the danger of the course on which it has started.

The contention that a subpoena procedure like the one involved in this case satisfies the confrontation right has not been limited to the context of laboratory reports. States have often made it in the context of hearsay exceptions for statements by

children alleged to be victims of abuse. *See, e.g.*, *Snowden v. State*, 867 A.2d 314, 332 (Md. 2005) (Maryland; contention rejected); *Schaal v. Gammon*, 233 F.3d 1103, 1106-07 (8th Cir. 2000) (similar; Missouri); *State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) (similar; Washington); *Lowery v. Collins*, 996 F.2d 770, 771-72 (5th Cir. 1993) (on rehearing) (similar; Texas). But there is no limit at all on the type of statement to which the procedure might be applied, if the ability to call a witness were considered the equivalent of the right to be confronted with a prosecution witness. *See Hoover v. Beto*, 439 F.2d 913, 924 (5th Cir. 1971) (rejecting contention in the context of accomplice confession).[8] Thus, approving Virginia's subpoena procedure in the context of lab reports ultimately threatens a fundamental alteration in the procedure governing criminal trials. States would be free to present the testimony of *any* witness by affidavit – or, when they

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[8] The *Hoover* court put the matter succinctly:

> That Sellars was available to be called as a witness does not mitigate the prosecution's misconduct here. The State sought to shift to the defendant the risk of calling Sellars to the stand. To accept the State's argument that the availability of Sellars is the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumptions of innocence and the burdens of proof which protect the accused. Hoover's undoubted right to call Sellars as a witness in his behalf cannot be substituted for his Sixth Amendment right to confront Sellars as a witness against him.

thought it was more advantageous, by video-taped statement, *see, e.g., Schaal, supra* – and leave it to the accused, if he was able and if he dared, to call the witness to trial himself.

What possible limitations could be imposed on the subpoena procedure if this Court sanctions it here? The Virginia Supreme Court appears to have suggested that lab reports are a particularly appropriate setting for the procedure, because the opportunity to cross-examine would not usually be worth the inconvenience created by calling the lab technician to testify.[9] The factual premise of the suggestion is unsupportable; as the Court noted in *Melendez-Diaz*, lab reports cannot be deemed so inherently trustworthy that cross-examination is of minuscule value. 129 S.Ct. at 2536-37.[10] More fundamentally,

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[9] Immediately after declining to "engage in . . . speculation" as to the bounds of its decision, the court declared:

> Furthermore, the provisions of Code § 19.2-187 obviate the need for the Commonwealth to call one of the limited number of forensic analysts to testify in every case in which a certificate of analysis is being offered into evidence if the defendant chooses not to exercise his confrontation rights by utilizing the procedure provided in Code § 19.2-187.1.

[10] For a very recent example of this basic point, see *People v. Dungo*, 2009 WL 2596892 (Cal. App. 3rd App. Dist. Aug. 24, 2009) (prior to *Melendez-Diaz*, trial court allows a pathologist not present at autopsy to testify on basis of, and disclose portions of, a report prepared by another pathologist since discredited; held, based in large part on the basis of *Melendez-Diaz*, that admission was error).

the doctrine at which the Virginia court hints – allowing the Confrontation Clause to be overcome on the basis of a judicial determination of the value of cross-examination in a particular case or class of cases – is nothing more than a resuscitation of the rejected regime of *Ohio v. Roberts*, 448 U.S. 56 (1980).

Petitioners have no wish to be overly dramatic. But it is necessary to recognize a wolf for what it is, no matter how bland or benign its appearance may be. It is clear that the transformation begun by *Crawford* – restoring the Confrontation Clause to its rightful place as one of the central protections of our criminal justice system – would be nullified if Virginia's subpoena procedure were approved by this Court. *Cf. Crawford, supra*, 541 U.S. at 50 ("Leaving the regulation of out-of-court statements to the law of evidence would render the Confrontation Clause powerless to prevent even the most flagrant inquisitorial practices.").

III. VIRGINIA'S SUBPOENA SYSTEM IS NOT NECESSARY TO PREVENT GRATUITOUS EXPENSE.

The efficiency-oriented language of the Virginia Supreme Court is constitutionally misguided. As *Melendez-Diaz* made clear, 129 S.Ct. at 2540:

> The Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against

> self-incrimination. The Confrontation Clause – like those other constitutional provisions – is binding, and we may not disregard it at our convenience.

The language of the Virginia court is also highly revealing. It suggests that Virginia's subpoena scheme saved money because defendants *do not often invoke the right* to call lab technicians as their own witnesses. Petitioners agree that under that scheme defendants rarely invoked the statutory right to call the technician. Why not? The explanation, petitioners believe, is that, because of the considerations discussed in Part II, the opportunity offered by that scheme is so far inferior to the right to cross-examine that defendants rarely found it worth the risks and negative tactical consequences to invoke it; put another way, the subpoena system provided a wholly inadequate substitute for the confrontation right.

Logically, the only other possible explanation is that the opportunity provided by the subpoena system is essentially equivalent to the right to be confronted with and cross-examine a prosecution witness, but that this right is of such minuscule value that the accused would not ordinarily invoke it. If this possibility were plausible, a state would not need a subpoena system to achieve the cost-saving benefit anticipated by the Supreme Court of Virginia. It could achieve the same benefit by a simple notice-and-demand statute of the type approved by *Melendez-Diaz*, 129 S.Ct. at 2541 (citing three examples), and adopted by Virginia in the wake of that decision.

Virginia Act of Assembly, 2009 Special Session I, Ch. 1, Aug. 21, 2009. "In their simplest form," as *Melendez-Diaz* explained, 129 S.Ct. at 2541, such statutes

> require the prosecution to provide notice to the defendant of its intent to use an analyst's report at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.

A subpoena system and a simple notice-and-demand system are crucially different. The key is that under the latter if the defendant makes the demand the *prosecution* must call the author of the report (or another person qualified to testify as to its contents) as a trial witness or forgo use of the report at trial. As compared to the traditional practice – in which the lab report could not be admitted, absent the live testimony of a qualified witness, over the objection of the accused – a simple notice-and-demand system alters only the *time* at which the accused must object, *Melendez-Diaz*, 129 S.Ct. at 2541, and the *form* in which the objection must be made. *Id.* at 2557 (Kennedy, J., dissenting) ("defendant must make a formal demand, with proper service, well before trial"). It does not alter the dynamics of the decision *whether* to object, nor does it diminish the value of confrontation.

Such a system fully preserves the accused's confrontation right. And at the same time, it operates efficiently.[11] It ensures that the lab technician will be required to testify subject to confrontation only when the accused has a strong enough interest in cross-examining her to be worth the cost to him of causing the technician's testimony to be presented live, far more vividly than in a paper report.[12]

Plainly, a simple notice-and-demand statute satisfies the state's legitimate interest in preventing gratuitous expense. Any *incremental* savings generated by a subpoena scheme such as Virginia's must be the result of impairing the right of the accused to examine the lab technician.

Reaffirmation by this Court that a simple notice-and-demand statute is constitutional may help quell

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[11] In Texas, a notice-and-demand state, fifty-five forensic chemists in Department of Public Safety crime laboratories examined evidence in a total of over 50,000 drug cases in 2004 (accounting for the majority of cases examined in the Department's crime labs). Texas Department of Public Safety, Criminal Law Enforcement Division, Crime Laboratory Service, Forensic Testing Services, *Drug Analysis Section*, <http://www.txdps.state.tx.us/criminal_law_enforcement/crime_laboratory/clabforensictesting/clabdruganalysis.htm>, last examined August 26, 2009. This is an average of over 900 cases per analyst each year.

[12] *See, e.g., State v. Simbara*, 811 A.2d 448 (N.J. 2002) ("in the majority of cases a defendant will not challenge the certificate either because the focus of the defense is otherwise or because he or she may not wish to suffer the piling-on effect of a live witness when there is no true contest over the nature of the tested substance") (citation, internal quotation marks omitted).

concerns that protecting the accused's confrontation right with respect to lab reports will cast an undue burden on the states.

Petitioners do not mean to suggest that a notice-and-demand statute is necessary to prevent such a burden. Numerous states manage under the traditional rule, in full compliance with the confrontation right and without any special provision for lab reports, so that if the prosecution wishes to present lab results it must either produce a live witness or – as most often happens – secure an affirmative waiver from the defense.[13]

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[13] Michigan, the home of petitioners' lead counsel, is one of the states adhering to traditional practice: A prosecutor wishing to prove the results of a forensic laboratory test must, absent an affirmative agreement by the defense, produce the laboratory analyst as a live witness. The State Appellate Defenders' Office ("SADO"), which is appointed in a random selection of approximately 25% of indigent trial appeals from every county in the state, maintains electronic copies of trial transcripts from its cases. Petitioners examined the transcripts of the 125 most recent trials in which SADO clients were convicted of drug-related offenses; the results are presented in Section B of the Appendix to this brief. In 122 of these cases, or approximately 97.6%, the prosecution presented evidence of laboratory results. In 50 of the 122 cases, a laboratory analyst testified at trial. In one other, by agreement of the parties, the deposition of an analyst was admitted; in another, also by agreement of the parties, the analyst was allowed to testify by telephone from his office; and in the remaining 70 cases, by agreement of the parties, the laboratory report was admitted without a live sponsoring witness. Thus, in only 50 out of a total of 125 drug cases, or 40%, was it necessary for a laboratory analyst to testify at trial. Petitioners do not know in how many of the cases it was

(Continued on following page)

States are also free to make depositions for the preservation of testimony a more regular feature of their criminal procedure. Depositions can be scheduled more easily than trial testimony, *see Melendez-Diaz*, 129 S.Ct. at 2550 (Kennedy, J., dissenting) (discussing difficulties of presenting live trial testimony of technicians), and if the analyst is then deemed unavailable (by distance or other reason) to testify at trial, the deposition could be introduced instead.

And, of course, if they believe that the system is bottle-necked, states are free to hire more lab technicians. They are a very small part of the criminal justice system, and would remain so even if their numbers were massively increased.[14] Virginia could

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the prosecution's decision to present the analyst as a live witness; for all petitioners know, it may be that in most of the 50 cases the prosecutor did not seek a stipulation.

Of the 52 cases in which an analyst gave live testimony in one form or another, the defendant cross-examined in 45 of them (48 analysts of a total 55), for an average of 3.93 page per analyst. Thus, in 36.9% of the cases in which the prosecution presented evidence of laboratory results, the defense actually cross-examined a witness competent to testify to about the tests and the results. In only 7 cases did an analyst testify live without cross-examination. Again, petitioners do not know in how many of these cases it was the prosecution's decision to present the live witness, but in any event it appears that rarely, if ever, did the defense insist on the analyst testifying at trial without intending to examine him or her.

[14] For example, Philadelphia employs 18 drug analysts. *Melendez-Diaz*, 129 S.Ct. at 2550 (Kennedy, J., dissenting). Its police department employs over 6,600 officers. Philadelphia Police Department, *Department History*, <http://www.ppdonline.

(Continued on following page)

not successfully contend that it may decline to furnish counsel to indigent defendants because there are too few willing defense lawyers in the Commonwealth; nor should it prevail in contending that its subpoena system, designed to limit the extent to which lab technicians testify subject to confrontation, is constitutional because the Commonwealth has hired too few trained lab technicians.

In short, protecting the confrontation with respect to laboratory reports need not impose any undue burden on the states. Concerns about expense should not deflect the Court from declaring Virginia's subpoena scheme to be unconstitutional, the result demanded both by *stare decisis* and by principle.

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org/hq_history.php>, last examined August 26, 2009. The Philadelphia District Attorney's Office employs 600 lawyers, detectives and support staff. City of Philadelphia District Attorney's Office, *About Us*, <http://www.phila.gov/district attorney/AboutUs/about.html>, last examined August 26, 2009.

CONCLUSION

The decision of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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September 1, 2009

APPENDIX

A. RELEVANT PORTIONS OF VIRGINIA CODE § 19.2-187

Former version; in force until August 21, 2009

Admission into evidence of certain certificates of analysis

In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial. . . .

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

Current version; in force from August 21, 2009

Admission into evidence of certain certificates of analysis

In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) the requirements of subsection A of § 19.2-187.1 have been satisfied and the accused has not objected to the admission of the certificate pursuant to subsection B of § 19.2-187.1, when any such analysis or examination is performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by a person

licensed by the Department of Forensic Science pursuant to § 18.2-268.9 or 46.2-341.26:9 to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory.

. . .

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

§ 19.2-187.01

Certificate of analysis as evidence of chain of custody of material described therein

A report of analysis duly attested by the person performing such analysis or examination in any laboratory operated by (i) the Division of Consolidated Laboratory Services, the Department of Forensic Science or any of its regional laboratories, or by any laboratory authorized by such Division or Department to conduct such analysis or examination; (ii) the Federal Bureau of Investigation; (iii) the federal Bureau of Alcohol, Tobacco and Firearms; (iv)

the Naval Criminal Investigative Service; (v) the federal Drug Enforcement Administration; (vi) the Postal Inspection Service; or (vii) the United States Secret Service shall be prima facie evidence in a criminal or civil proceeding as to the custody of the material described therein from the time such material is received by an authorized agent of such laboratory until such material is released subsequent to such analysis or examination. Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it. The signature of the person who received the material for the laboratory on the request for laboratory examination form shall be deemed prima facie evidence that the person receiving the material was an authorized agent and that such receipt constitutes proper receipt by the laboratory for purposes of this section.

§ 19.2-187.1

Former version; in force until August 21, 2009

Right to examine person performing analysis or involved in chain of custody

The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a

witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

Current version; in force from August 21, 2009

Procedures for notifying accused of certificate of analysis; waiver; continuances.

A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the Commonwealth intends to offer a certificate of analysis into evidence pursuant to § 19.2-187, the attorney for the Commonwealth shall:

1. Provide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the hearing or trial;

2. Attach to the copy of the certificate so provided under subdivision 1 a notice to the accused of his right to object to having the certificate admitted without the person who performed the analysis or examination being present and testifying; and

3. File a copy of the certificate and notice with the clerk of the court hearing the matter on the day that the certificate and notice are provided to the accused.

B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination. Such objection shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the certificate and notice were filed with the clerk by the attorney for the Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination is admitted into evidence describing the facts and results of the analysis or examination during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

C. Where the person who performed the analysis and examination is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if the accused has been held continuously in custody and not more than 180 days if the accused has not been held continuously in custody.

D. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness of the receipt of notice required by subsection A shall be made before hearing or trial upon his receipt of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the time requirements of this section shall constitute prima facie evidence that the notice was timely received by the accused. If the court finds upon the accused's objection made pursuant to this subsection, that he did not receive timely notice pursuant to subsection A, the accused's objection shall not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject to the time limitations set forth in subsection C.

E. The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

B. MICHIGAN DRUG PROSECUTIONS: PRESENTATION OF LAB ANALYSES

This table presents the results of the examination of trial transcripts from Michigan drug prosecutions described in footnote 10 of the brief.

Defendant's Last Name	Court[1]	Docket Number	Trial Start Date	Lab Results Presented?	Live Witness?	# Pages Cross[2]
DeMann	Allegan	05-14225-FH	11/7/2005	Yes	Yes	0.5
Whitehorn	Allegan	06-15025-FH	4/4/2007	Yes	Yes	3.5
Rosenberg	Barry	02-200-FH	9/16/2002	Yes	No	
Newson	Bay	04-10314 FC	10/5/2004	Yes	Yes	4.5
Snow	Bay	07-10666-FH 07-10667-FH	3/4/2008	Yes	Yes	3.5, 1[3]
Miller, O.	Berrien (Drug)	200441063	6/23/2004	Yes	No	
Futrell	Berrien (Drug)	2004406061FH	12/16/2004	Yes	No	
Hall, A.	Berrien (Drug)	2005401850	5/26/2005	Yes	Yes	7[4]
Underwood	Berrien (Drug)	2005412135FH	12/1/2005	Yes	Yes	3
McKinney	Berrien (Drug)	2006404059FH	9/8/2006	Yes	No	
Cole	Berrien (Drug)	2007403353fh	10/9/2007	No		
Williams, P.	Berrien (Drug)	07-405372-FH	1/17/2008	Yes	Yes	0
Mosley	Calhoun	04-2798 FH	3/15/2005	Yes	Yes	0
Moore	Cass	05-10083	8/2/2005	Yes	Yes	2.5
Reeves	Cass	05-10149 05-10361	1/18/2006	Yes	Yes	3
Ryans	Cass	07-10080	7/31/2007	Yes	No	
Blackamore	Cass	07-10290	1/8/2008	Yes	No	
Biggs	Cass	08-10096	7/8/2008	No		

Passino	Cheboygan	08-3788-FH	5/13/2008	Yes	No	
Poe	Chippewa	07-8336-FH	7/9/2007	Yes	No	
Peltola	Dickinson	08-4032-FH	9/30/2008	Yes	No	
Pate	Eaton	04-483-FC	3/1/2005	Yes	Yes	1
Huver	Eaton	06-118-FH	6/12/2006	Yes	No	
Robins	Eaton	07-305-FH 07-313-FH	11/19/2008	Yes	No	
Orr	Emmet	06-2614-FH	12/11/2006	Yes	No	
Engle	Emmet	05-2533-FH	12/14/2006	Yes	Yes	1
Burks	Emmet	2007-2770-FH	9/25/2007	Yes	No	
Savage	Emmet	07-2888-FH	2/19/2008	Yes	Yes	1, 2[3]
Hollingsworth	Genesee	05-16364-FH	7/14/2005	Yes	Yes	0.5
Jones, S.	Genesee	05-016528-FH	9/20/2005	Yes	Yes	2
DeWalt	Genesee	08-22022-FH	2/26/2008	Yes	Yes	2
Eggers	Gogebic	G 03-270 FH	4/20/2004	Yes	Yes	0
Fetterolf	Grand Traverse	03-9151-FH	11/10/2003	Yes	Yes	3
Lessard	Grand Traverse	05-9704-FH	5/4/2005	No		
Hayes	Grand Traverse	07-10313-FC	8/21/2007	Yes	No	
Walker, D.	Ingham	04-72=FH	5/31/2005	Yes	Yes	26
Cantu	Ingham	01-076660-FH	7/18/2005	Yes	Yes	1
Myles	Ingham	07-905-FH	1/31/2008	Yes	No	
Caniff	Ionia	12640	7/8/2004	Yes	No	

Sanders	Jackson	04-000915-FH	3/30/2005	Yes	Yes	4
Brown	Jackson	2006-003491-FH	7/26/2006	Yes	No	
Skidmore	Jackson	2006-3318-FH	9/25/2006	Yes	Yes	13
Weaver	Jackson	2007-3711-FH	6/11/2007	Yes	No	
Phason	Kalamazoo	D02-1698 FH	10/28/2003	Yes	No	
Gilliam	Kalamazoo	05-002430 FH	4/4/2006	Yes	No	
Johnson	Kalamazoo	06002077 FH	3/1/2007	Yes	Yes	4.5
Ferguson	Kalamazoo	C2008-0897FH	11/4/2008	Yes	No	
Abramczyk	Kalkaska	03-2323-FH(D)	11/24/2003	Yes	Yes	3.5
Minix	Kalkaska	07-2836-FH	10/29/2007	Yes	Yes	2
Legree	Kent	02-09102-FH	6/13/2005	Yes	No	
Hilaski	Kent	05-03837-FH	11/6/2006	Yes	Yes	6
Runyon	Kent	07-04681-FH	8/15/2007	Yes	No	
Jorah	Kent	06-09052-FH	9/4/2007	Yes	Yes	1.5
Uphaus	Livingston	05-014970-FH	6/27/2005	Yes	Yes	3.5
Miclea	Livingston	07-016334-FH	6/26/2007	Yes	No	
Palacios	Macomb	03-1281-FH	12/2/2003	Yes	No	
Williams, E.	Macomb	05-1564-FH	10/26/2005	Yes	Yes	2
Peoples	Macomb	06-1902-FH	1/30/2007	Yes	Yes	0
Daoud	Macomb	07-5300-FH	3/5/2008	Yes	Yes	6
Quinn	Mason	06-00-1580-FH	5/17/2006	Yes	Yes	6
Kacienda	Mecosta	03-005124-FR	12/3/2003	Yes	Yes	15.5
Kregear	Missaukee	04-101905-FH	11/2/2004	Yes	Yes	0.5
Black	Monroe	02-320450FH	12/9/2002	Yes	No	
Montague	Monroe	03-33173-FH	5/6/2004	Yes	Yes	1.5
Evans	Monroe	05-34552-FH	7/5/2006	Yes	No	

McCoy	Monroe	06-35638-FH	2/5/2007	Yes	No	
Johnican	Monroe	07-36095-FH	12/5/2007	Yes	Yes	2
Salinas	Muskegon	02-47140-FC	1/17/2003	Yes	No	
Bailey	Muskegon	02-47931-FH	12/9/2003	Yes	No	
Vangeison	Muskegon	03-48408-FH	1/21/2004	Yes	Yes	1.5
Morehead	Muskegon	06-53546-FC	12/5/2006	Yes	No	
Harris	Oakland	2003-192102-FC	4/26/2004	Yes	No	
Capeles	Oakland	04-194666-FH	7/29/2004	Yes	No	
Washington	Oakland	04-196772-FH	7/12/2005	Yes	No	
Jacques	Oakland	2004-197790-FH	10/13/2005	Yes	No	
Hardiman	Oakland	04 196749-FH	10/31/2005	Yes	No	
Murray	Oakland	03-189072-FH 03-189082-FH	11/2/2005	Yes	No	
Jacobson	Oakland	05-204549-FH	12/6/2005	Yes	Yes	2
Jackson	Oakland	05-205408-FC 05-205409-FC	4/17/2006	Yes	No	
Greene	Oakland	06-206966-FC 06-206970-FC	5/11/2006	Yes	No	
Watson	Oakland	05-204038-FC	5/25/2006	Yes	No	
Mallory	Oakland	06-207596-FC	6/1/2006	Yes	No	
Thomas	Oakland	06-206294-FH	6/15/2006	Yes	No	
Giles	Oakland	05-205314	9/28/2006	Yes	Yes	3
Mathis	Oakland	06-211580-FH	5/18/2007	Yes	No	
Dye	Oakland	06-210088-FH	6/5/2007	Yes	No	
Hall, S.	Oakland	07-214930-FH	9/11/2007	Yes	Yes	0.5
Bell	Oakland	07-215014-FH	9/27/2007	Yes	No	
Jones, F.	Oakland	08-219309-FH	5/23/2008	Yes	No	
Sims	Oakland	08-220535-FH	7/10/2008	Yes	No	

Dent	Oakland	2007-216132-FH	9/25/2008	Yes	No	
Williams, J.	Otsego	03-2920-FH	3/25/2004	Yes	No	
Markey	Presque Isle	04-092208-FC 04-092209-FC	6/8/2005	Yes	No	
Green	Roscommon	05-4996-FH	2/9/2006	Yes	Yes	2.5
Bridges	Saginaw	06-027887-FH-1	3/13/2007	Yes	Yes	1
Armstrong	St. Clair	K 03-001208 FH	9/23/2003	Yes	Yes	3
Burries	St. Clair	K 04-002071	1/4/2005	Yes	Yes	0
Essenmacher	St. Clair	D-06-631-FH	6/27/2006	Yes	Yes	3
Miller, V.	St. Clair	D-07-821-FC	9/18/2007	Yes	Deposition	17[5]
Williams	St. Clair	K 07-002286 FH	12/11/2007	Yes	Yes	3.5
Carnicom	St. Joseph	04-12272 FH	9/22/2004	Yes	Yes	2, 4.5[3]
Fuller	Tuscola	03-8864-FH	1/21/2004	Yes	Yes	0
Yocic	Tuscola	03-8855-FH	2/3/2004	Yes	Yes	0
Fisher	Tuscola	03-8955-FH	2/8/2005	Yes	Yes	4.5
Peters	Tuscola	07-010552-FH	7/15/2008	Yes	Yes	1
Taylor	Washtenaw	05-1797-FH 03-603-FH	6/19/2006	Yes	No	
Rashad	Wayne (Detroit Recorder's Court)	88-12274	10/18/1989	Yes	No	
Marin	Wayne	02-8432 01	9/18/2002	Yes	No	
Newby	Wayne	02-3910	12/16/2002	Yes	No	
Snedacar	Wayne	04-1682	4/20/2004	Yes	No	

Maddox	Wayne	04-005427	8/10/2004	Yes	No
Poston	Wayne	04-9948	12/6/2004	Yes	No
Moon	Wayne	05-4078	10/13/2005	Yes	No
Campbell, K.	Wayne	05-7721 05-5277	11/7/2005	Yes	No
Cotton	Wayne	05-9454	1/10/2006	Yes	No
Richardson	Wayne	06-0902-364	6/14/2006	Yes	No
Holden	Wayne	06-4729	6/22/2006	Yes	No
Davis	Wayne	03-12827	9/12/2006	Yes	No
Rogers	Wayne	06-010620 06-010994	12/18/2006	Yes	No
Walker, E.	Wayne	06-14092	3/14/2007	Yes	No
McClammy	Wayne	07-03871	4/5/2007	Yes	No
Staley	Wayne	07-7962-01	7/12/2007	Yes	No
Reber	Wayne	07-9642	8/15/2007	Yes	No
Lively	Wayne	04-11339	1/16/2008	Yes	No
Campbell, L.	Wayne	07-15213-C0 07-15213-C1	1/30/2008	Yes	No

[1] Circuit Court of identified county, except where otherwise stated.

[2] Rounded to nearest half page; minimum of 0.5 pages indicated for any substantive questioning.

[3] Two separate analysts.

[4] Examination done by telephone.

[5] Deposition.

RESPONDENT'S BRIEF

(4)

Supreme Court, U.S.
FILED
OCT 29 2009

No. 07-11191

In The
Supreme Court of the United States

MARK A. BRISCOE AND SHELDON A. CYPRESS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Virginia

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QUESTIONS PRESENTED

Did the petitioners waive their Confrontation Clause rights by failing to make a demand that the prosecution produce a forensic analyst for trial?

Is the Confrontation Clause satisfied by a witness who testifies live, under oath and subject to cross examination, or does the Clause further require a particular sequence of witness examination and introduction of exhibits?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 9

ARGUMENT 12

I. THE PETITIONERS WAIVED THEIR CONFRONTATION RIGHTS BY FAILING TO DEMAND THAT THE PROSECUTION PRODUCE THE ANALYST AND NOW SEEK TO TAKE ADVANTAGE OF THAT WAIVER BY OBTAINING AN ADVISORY OPINION ABOUT WHAT MIGHT HAVE HAPPENED HAD THE ANALYST BEEN PRESENT 13

A. In characterizing *Virginia Code* § 19.2-187.1 as a "subpoena statute," the petitioners ignore the construction that the Supreme Court of Virginia placed upon the law 13

B. The Court should decline to provide an advisory opinion based on purely hypothetical scenarios 19

II. BY PROVIDING A DEFENDANT WITH THE OPPORTUNITY TO CROSS-EXAMINE A WITNESS WHO IS FACE-TO-FACE, UNDER OATH, VIRGINIA LAW SATISFIED THE DEMANDS OF THE CONFRONTATION CLAUSE 25

TABLE OF CONTENTS – Continued

Page

A. The constitutional text alone does not resolve the issue 27

B. The evils targeted by the Confrontation Clause have nothing to do with who first questions a witness or at what point during a trial an item is introduced into evidence 30

1. The colonial experience in the royal vice-admiralty courts does not support the petitioners' "sequence of witnesses" argument..... 31

2. The notorious treason trials of England do not support the petitioners..... 32

3. State constitutions adopted in the wake of independence do not support the petitioners' "plain language" argument..... 33

4. Contemporaneous treatises do not tie the importance of live examination of witnesses to any particular order of witnesses or sequence of introducing evidence 35

5. The Confrontation Clause was not designed to displace the flexibility that characterized colonial trials..... 37

TABLE OF CONTENTS – Continued

Page

6. The petitioners' expansive reading of the protections of the Confrontation Clause would take the Clause far beyond its historical moorings 39

C. The petitioners' remaining criticisms of the Virginia statute are without merit .. 41

1. The petitioners' burden of proof and fundamental fairness arguments fall within the Due Process Clause, not the Confrontation Clause 41

2. The prosecution established the chain of custody 43

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Ashwander v. TVA,
297 U.S. 288 (1936) 23

Bell v. Virginia,
622 S.E.2d 751 (Va. Ct. App. 2005) 1

California v. Green,
399 U.S. 149 (1970) 25, 28, 29, 40

Crawford v. Washington,
541 U.S. 36 (2004) 5, 26, 30, 31, 32, 33

Giles v. California,
128 S. Ct. 2678 (2008) 30

Grant v. Virginia,
682 S.E.2d 84 (Va. Ct. App. 2009) 16, 18

Gray v. Virginia,
265 S.E.2d 705 (Va. 1980) 1

Hays v. Arizona Corp. Comm'n,
409 P.2d 282 (Az. 1965) 16

In re Edwards,
130 So. 615 (Fla. 1930) 16

In re Winship,
397 U.S. 358 (1970) 42

Johnson v. State,
10 Tenn. (2 Yer.) 58 (1821) 35

Kentucky v. Stincer,
482 U.S. 730 (1987) 43, 45

Magruder v. Virginia,
275 Va. 283, 657 S.E.2d 113 (2008) 17

TABLE OF AUTHORITIES – Continued

Page

Mattox v. United States,
156 U.S. 237 (1985) 25, 30

McGoldrick v. Compagnie Generale Transatlantique,
309 U.S. 430 (1940) 43

Melendez-Diaz v. Massachusetts,
129 S. Ct. 2527 (2009) 8, 13, 15, 27, 42, 44

Mullins v. Virginia,
404 S.E.2d 237 (Va. Ct. App. 1991) 1

Niles v. Boston Rent Control Adm'r,
374 N.E.2d 296 (Mass. App. Ct. 1978) 16

Spencer v. Texas,
385 U.S. 554 (1967) 39, 42

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 23

Stone v. Powell,
428 U.S. 465 (1976) 43

Tacon v. Arizona,
410 U.S. 351 (1973) 28

Taylor v. Illinois,
484 U.S. 400 (1998) 13

United States v. Brooks,
928 F.2d 1403 (4th Cir. 1991) 20

United States v. Owens,
484 U.S. 554 (1988) 25

Virginia v. Doe,
682 S.E.2d 906 (Va. 2009) 16

TABLE OF AUTHORITIES – Continued

Page

Washington State Grange v. Washington State Republican Party, 128 S. Ct. 1184 (2008) 23

Wigglesworth v. Oregon, 49 F.3d 578 (9th Cir. 1995) 41

Williams v. Virginia, 360 S.E.2d 361 (Va. 1987) 21

Wisconsin v. Mitchell, 508 U.S. 476 (1993) 15

Yee v. City of Escondido, 503 U.S. 519 (1992) 43

CONSTITUTIONAL PROVISIONS

Del. Decl. of Rights § 14 (1776) 34

Mass. Const. § 12 (1780) 34

Md. Decl. of Rights § 19 (1776) 34

N.C. Const., Decl. of Rights § 7 (1776) 34

N.H. Const. Art. I, § 15 (1784) 34

Pa. Const. § 9 (1776) 34

Va. Const. § 8 (1776) 34

STATUTES

1 & 2 *Philip & Mary, c.* 10 (1554) *and* 1 *Eliz., c.* 1 § XXXVII (1558) 33

Virginia Code § 9.1-1101 2

TABLE OF AUTHORITIES – Continued

Page

Virginia Code § 19.2-187 ..... 1, 2, 8, 14, 23

Virginia Code § 19.2-187.01 ..... 6, 43

Virginia Code § 19.2-187.1 ..... 2, 7, 8, 9, 13, 15, 17

Virginia Code § 46.2-1052 3

ACTS OF ASSEMBLY

1976 Va. Acts ch. 245 2

OTHER AUTHORITIES

1 A.E. Dick Howard,
COMMENTARIES ON THE CONSTITUTION OF VIRGINIA (1974) 30

1 REPORTS OF THE TRIALS OF COLONEL AARON BURR FOR TREASON (1808) 38

3 William Blackstone,
COMMENTARIES ON THE LAWS OF ENGLAND (1768) 36, 37

Charles W. Fricke,
PLANNING AND TRYING CASES (1957) 21

Daniel D. Blinka,
Trial by Jury on the Eve of Revolution: the Virginia Experience,
71 UMKC L. REV. 529 (2003) 37

Daniel H. Pollitt,
The Right of Confrontation: Its History and Modern Dress,
8 J. PUB. L. 381 (1959) 31, 32, 33

TABLE OF AUTHORITIES – Continued

Page

David G. Savage,
Supreme Court Ruling Shakes Up Criminal Trials,
L.A. TIMES (July 26, 2009) 2

Erwin N. Griswold,
The Due Process Revolution and Confrontation,
119 U. PA. L. REV. 711 (1971) 28

Francis H. Heller,
THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES (1951) 29, 30, 32

Hilton Spellman,
DIRECT EXAMINATION OF WITNESSES (1968).....20

Letter by the First Continental Congress to the Inhabitants of the Province of Quebec, October 26, 1774 32

Matthew Hale,
THE HISTORY OF THE COMMON LAW OF ENGLAND 163 (Charles M. Gray ed. Univ. of Chi. Press 1971) (1713).....36

REPORT OF THE VIRGINIA STATE CRIME COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON FORENSIC SCIENCE, H. Doc. No. 36 (1975).....2

Ronald M. Peters, Jr.,
THE MASSACHUSETTS CONSTITUTION OF 1780 (1974).....34

TABLE OF AUTHORITIES – Continued

Page

Sir James Fitzjames Stephen,
Criminal Procedure from the Thirteenth to the Eighteenth Century,
in 2 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 443 (1908).....33

The Boston Massacre Trials,
in 2 LEGAL PAPERS OF JOHN ADAMS 27
(L. Kinvin Wroth & Hiller B. Zobel eds., 1965).....38

XIII THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION,
doc. No. 221, p. 527, Brutus No. 2,
published 1787 (2003).....35

STATEMENT OF THE CASE

Under *Virginia Code* § 19.2-187, a "duly attested" certificate of analysis by the "person performing an analysis or examination" in certain laboratories may be admitted into evidence "[i]n any hearing or trial of any criminal offense . . . as evidence of the facts therein stated and the results of the analysis or examination referred to therein." A prerequisite to admitting such a certificate of analysis is that the certificate must be "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." *Id.* Defense counsel can obtain a copy of the certificate of analysis by making a request to the clerk at least 10 days before trial. *Id.* If the government fails to follow the procedures set forth in the statute, the certificate of analysis will not be admitted at trial. *See Gray v. Virginia*, 265 S.E.2d 705, 706 (Va. 1980); *Bell v. Virginia*, 622 S.E.2d 751, 755-58 (Va. Ct. App. 2005); *Mullins v. Virginia*, 404 S.E.2d 237, 238-39 (Va. Ct. App. 1991).

A second statute, *Virginia Code* § 19.2-187.1, sets forth a procedure for the accused to examine the person performing the analysis or examination. It provides that

> [t]he accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine

> him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

Virginia Code §§ 19.2-187 and 19.2-187.1 were enacted in 1976. 1976 Va. Acts ch. 245. A report by the Virginia Crime Commission indicates that the legislation was introduced to "reduce the time spent by key personnel for travel and court appearances" and to "improve services, since much time now spent in court appearances can be used in direct analysis and examinations." REPORT OF THE VIRGINIA STATE CRIME COMMISSION TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA ON FORENSIC SCIENCE, H. Doc. No. 36 (1975). Of course, in addition to streamlining trials and conserving scarce state resources, these statutes benefit defendants, because they prevent the delay that would result if the limited number of analysts were required to testify every time a certificate of analysis is offered into evidence.

In Virginia, forensic analysts work for a state agency that is independent of the prosecution and the police. *Virginia Code* § 9.1-1101 et seq. The analysts specialize in drug tests and they are highly educated and trained. The tests for determining the identity of a substance are routine, simple, and scientifically validated. Therefore, as one prominent Virginia defense attorney recently noted, "[i]t will be unusual for a defense lawyer to insist on live testimony. All you are doing in those situations is emphasizing the evidence that incriminates your client." David G. Savage,

Supreme Court Ruling Shakes Up Criminal Trials, L.A. TIMES (July 26, 2009) (quoting Steven D. Benjamin).

These provisions were at issue in two separate cases. Sheldon A. Cypress was a passenger in a car stopped by police in the City of Chesapeake, Virginia, for having improperly tinted windows, in violation of *Virginia Code* § 46.2-1052. App. 95, 186. After the driver, Cypress's cousin, consented to a search of the car, the officer observed what he suspected was a marijuana cigarette in plain view. App. 95-96, 186. The officer then asked Cypress if he had any more marijuana in the car. Cypress acknowledged that he had more marijuana in his book bag. App. 97. Continuing his search, the officer found additional marijuana in Cypress's book bag, along with a digital scale and empty plastic baggies. App. 97. The officer also found two bags containing a "chunky white substance," one under Cypress's seat and the other under the driver's seat. App. 97, 186.

A test by the Division of Forensic Science determined that the substance was cocaine. App. 186. These test results were recited in a certificate of analysis, which was signed by the analyst who performed the test. App. 84-87. The analyst also attested that she had performed the analysis. App. 86-87. A certificate of analysis reflecting these results was filed in the Circuit Court for the City of Chesapeake on November 28, 2005. App. 84.

Cypress was charged with possession of cocaine with the intent to distribute, having previously

committed the offense of distribution or possession with the intent to distribute. App. 88-89, 186-87. His trial took place on April 6, 2006. App. 90.

In the 129 days between the time the certificate was filed and the trial, the defense made no request for the forensic analyst to be present at trial. At trial, however, Cypress objected to the admission of the certificate of analysis, contending that it was "testimonial" evidence that could not be admitted without the testimony of the forensic analyst who had conducted the test. App. 106, 187. The trial court overruled the objection, holding that the evidence was not testimonial. App. 112, 187. Cypress did not present any evidence. App. 153, 187. Following a bench trial, Cypress was convicted of possession of cocaine with the intent to distribute, second or subsequent offense. He was sentenced to serve 15 years, with 10 years suspended, and a fine was imposed. App. 173, 187.

The Court of Appeals of Virginia denied Cypress's appeal in an unpublished opinion. App. 176-80. Cypress appealed to the Supreme Court of Virginia, and that Court agreed to hear his appeal.

The other petitioner in this appeal is Mark A. Briscoe. During the execution of a search warrant for Briscoe's apartment in Alexandria, Virginia, police recovered suspected cocaine scattered in the kitchen area, two digital scales, a razor blade, a 100-gram weight, and a box of plastic sandwich bags. App. 24-28, 53, 189. When they searched Briscoe, police

retrieved from the front pocket of his shorts a white, rock-like substance wrapped in plastic. App. 18, 189. Briscoe later admitted that "all that s**t you guys got out of my house is mine, the coke, the crack, the baggies. It was all mine." App. 61. He further gave a detailed statement about where he purchased the cocaine and his extensive involvement in drug dealing. App. 61-65.

Police submitted the suspected drugs for testing to the Virginia Department of Criminal Justice Services, Division of Forensic Science. App. 29. A forensic analyst prepared two certificates of analysis, which stated that the substances were cocaine in an amount totaling 36.578 grams. App. 4-7, 189. The analyst signed the certificates, stated that she had performed the analyses, and recited that the certificates accurately reflected the results of the analysis. App. 5, 7. Briscoe was charged with possession of cocaine with the intent to distribute, conspiracy to distribute cocaine, and unlawful transportation of cocaine into the Commonwealth. App. 9-10, 190. The certificates of analysis were filed in the Circuit Court for the City of Alexandria on May 24, 2005. App. 6. Briscoe was tried 23 days later, on June 16, 2005. App. 11.

At no point did Briscoe make any demand that the Commonwealth produce the analyst for trial. At his bench trial, the prosecution introduced into evidence the two certificates of analysis. App. 31, 58, 190. Briscoe argued that the certificates were "testimonial" evidence under the holding in *Crawford*

v. Washington, 541 U.S. 36 (2004), and that admitting the certificates of analysis without the testimony of the forensic analyst therefore constituted a violation of his right to confront witnesses. App. 33-38, 190. The trial court overruled this objection, concluding that the statutory procedure available under *Virginia Code* § 19.2-187.1 adequately protected his right to confront the analyst. Briscoe did not present any evidence. App. 50-51, 190-91. The trial court convicted him, and he was sentenced to serve a total of 20 years in prison, with all but five years and eight months suspended. App. 71-74, 191.

The Court of Appeals of Virginia affirmed Briscoe's convictions by an unpublished *per curiam* order. App. 75-81. Briscoe then appealed to the Supreme Court of Virginia. That court granted his petition and consolidated his case with two other cases, including *Cypress v. Virginia*, detailed above.[1]

The Supreme Court of Virginia affirmed both convictions. App. 182. The Court first reasoned that it was not necessary to reach the issue of whether a certificate of analysis is testimonial evidence. App. 194. Instead, the court upheld the admission of the certificates of analysis under Virginia's statutory scheme. The court concluded that

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[1] The third defendant, Michael Ricardo Magruder, whose case was consolidated with Briscoe's and Cypress's, did not seek this Court's review.

> the defendants could have insured the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, ***or asking the trial court or Commonwealth to do so.*** At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses, meaning the defendants could have cross-examined them.

App. 200 (emphasis added). "In short," the court held, "if the defendants had utilized the procedure provided in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." App. 200-01.

The court rejected the petitioners' arguments that they could not be required to take affirmative steps to assert a right to confront witnesses. The court reasoned that States can, and frequently do, regulate the exercise of constitutional rights. App. 201-02. For example, States require defendants to provide notice when they intend to raise an alibi defense. App. 203.

The court rejected the petitioners' contention that Virginia's statutory scheme compels a defendant to call the analyst to exercise his Confrontation rights. In the court's view, these arguments were "due process concerns" rather than Confrontation Clause issues. App. 204-05. The court noted:

> [b]ecause the defendants did not avail themselves of the opportunity to require the

> presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness."

App. 205. Thus, the trial court "never had occasion to address the proper order of proof." App. 205.

The court found that "[b]ased on the provisions of Code §§ 19.2-187 and 19.2-187.1, no criminal defendant can seriously contend that he is not on notice that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis unless he utilizes the procedure provided in Code § 19.2-187.1." App. 210. Finally, the court held that the defendants could, and did, waive their confrontation rights by failing to seek the presence of the analyst at trial. App. 210.

After this Court granted certiorari, and having the benefit of a signal by this Court regarding which type of "notice and demand" statutes were constitutionally unassailable, *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2541 (2009), the General Assembly of Virginia convened in a one-day special session to revisit the Virginia statutes. The General Assembly amended the statutes at issue. The legislation contained an "emergency enactment

clause" and thereby went into effect immediately upon signature of the Governor, on August 21, 2009.[2]

SUMMARY OF THE ARGUMENT

1. To grant the petitioners relief, this Court would have to transgress two fundamental principles of its jurisprudence. First, the Court would have to ignore a State Supreme Court's interpretation of a state law. Second, the Court would have to render an advisory opinion on hypothetical facts not before the Court.

Contrary to the petitioners' assertion that *Virginia Code* § 19.2-187.1 is a "subpoena statute"—one that requires a defendant who wishes to confront the analyst to issue a subpoena—the Supreme Court of Virginia, in construing this statute, held that a defendant can make a demand for the prosecutor to produce the analyst for trial. If the prosecutor fails to produce the analyst at trial based on such a demand, Virginia case law makes clear, the certificate of analysis is inadmissible. The petitioners waived their right to confront the analyst because they failed to take the minimal step of asking the prosecution to produce the analyst for trial. Given the construction placed upon this Virginia statute by the Supreme Court of Virginia, the statute does not improperly

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[2] *See* http://leg1.state.va.us/cgi-bin/legp504.exe?092+sum+HB5007.

conflate the right of compulsory process with the right to confrontation.

Aside from their erroneous characterization of Virginia law as a "subpoena statute," the petitioners' arguments rest upon two unfounded premises. First, they contend that had the analyst been present, Virginia law would have required them to call the analyst as part of the defense case. Second, the petitioners contend that the statutes would have allowed the prosecution to introduce the certificate of analysis into evidence before the defense had a chance to cross-examine the analyst. These contentions are both speculative. The petitioners were not forced to do either of those things, because the petitioners never asked the prosecution to ensure the presence of the analyst. The petitioners' hypothetical application of the statute amounts to a request for an advisory opinion based on facts not before the Court.

It is in fact unlikely, had the petitioners demanded that the prosecution produce the analyst for trial, that they would have been forced, over their objection, to call the analyst as part of the defense case. When faced with a demand for the analyst to testify, most prosecutors, for tactical reasons, and most trial courts, to diffuse a possible basis for reversal on an unsettled legal issue, will see to it that (1) the analyst is called as part of the prosecution's case-in-chief and (2) that the certificate of analysis is introduced into evidence after the analyst has testified. The Supreme Court of Virginia therefore

correctly held that the petitioners waived their Confrontation Clause claim.

2. If this Court nevertheless chooses to address the petitioners' hypothetical scenarios, the Confrontation Clause is not violated so long as a defendant is provided with the opportunity to cross-examine a witness who testifies under oath, face-to-face, in open court. The Virginia statutes fulfill these objectives. The petitioners contend, however, that the Confrontation Clause is not satisfied by cross-examination during the defense's case of an adverse witness. Their proposed gloss on the cross-examination right protected by the Confrontation Clause is without merit.

The text itself does not supply the answer. Therefore, the Court should turn to the historical purposes that motivated the Framers to include the Confrontation Clause in the Bill of Rights. Nothing in the history of the Confrontation Clause supports the notion that the Framers of the Clause were concerned with any particular sequence of witness examination or at what point during the trial an exhibit is introduced. The trials of colonists in the vice-admiralty courts and the historic treason trials of figures such as Sir Walter Raleigh were deficient because they permitted the use of *ex parte* affidavits with no right of cross-examination. The petitioners' view of the Confrontation Clause finds no support in the equivalent provisions of State constitutions at the time of the Framing. In fact, colonial trial practice was characterized by flexibility in the examination of

witnesses. The historical record simply does not support the argument that the Confrontation Clause requires a distinct sequence of witness examination or of introduction of exhibits.

To the extent that requiring a defendant to call a witness as adverse during the defense case raises any constitutional concerns, those are due process issues, not Confrontation Clause issues. The Due Process Clause, however, is not part of the question presented and was not part of the petitioners' arguments in the Supreme Court of Virginia. The petitioners remaining criticisms of the Virginia statute are without merit.

ARGUMENT

Under Virginia's notice and demand statutes, the petitioners could have ensured the presence of the analyst by making a demand, within a reasonable time, that the prosecution produce the analyst. They did not do so. Their contentions about what might have happened had the analyst been present rest on speculation. Beyond this, the petitioners envision a Confrontation Clause whose purpose is to obviate certain "tactical decisions" by the defense at trial and to protect a particular sequence of witnesses and evidence. Nothing in the long history of the Clause supports this conception. The Confrontation Clause was designed to ensure that a witness testifies face-to-face, under oath, and

subject to cross-examination. Virginia law satisfied these requirements.

I. THE PETITIONERS WAIVED THEIR CONFRONTATION RIGHTS BY FAILING TO DEMAND THAT THE PROSECUTION PRODUCE THE ANALYST AND NOW SEEK TO TAKE ADVANTAGE OF THAT WAIVER BY OBTAINING AN ADVISORY OPINION ABOUT WHAT MIGHT HAVE HAPPENED HAD THE ANALYST BEEN PRESENT.

A. In characterizing *Virginia Code* § 19.2-187.1 as a "subpoena statute," the petitioners ignore the construction that the Supreme Court of Virginia placed upon the law.

In *Melendez-Diaz*, this Court specifically approved of "notice and demand" statutes that regulate the exercise of confrontation rights. 129 S. Ct. at 2541. Although, as a general proposition, confrontation "arise[s] automatically on the initiation of the adversary process and no action by the defendant is necessary to make [it] active in his or her case," *Taylor v. Illinois*, 484 U.S. 400, 410 (1998), "states are free to adopt rules governing" a defendant's Confrontation Clause objection. *Melendez-Diaz*, 129 S. Ct. at 2541.

These notice and demand statutes serve important state interests. The petitioners criticize what they characterize as the "efficiency-oriented

language" of the Supreme Court of Virginia, Pet. Br. 29-30 (discussing App. 211-12 n.5), but they misconstrue the court's discussion regarding the underlying purpose of the statute. In context, it is plain this discussion addresses the compelling state interest in having a defendant state his Confrontation Clause objection prior to trial. As many other States have done, Virginia sensibly streamlined trial practice to ensure the analysts are present when their testimony genuinely is in dispute, but not otherwise.

The first component of a "notice and demand" statute is notice. The Supreme Court of Virginia concluded that the statutes at issue provided sufficient notice to a defendant. App. 209-10. *Virginia Code* § 19.2-187 makes it clear that a certificate of analysis is admissible without the testimony of the analyst. The prosecution must file the certificate with the trial court in advance of trial, and defense counsel can request a copy. *Id.* Although the statute did not provide "explicit notice outlining the consequences of failing to utilize the procedure set forth in Code § 19.2-187.1," the consequences of failing to require the presence of a particular forensic analyst at trial are plain. App. 210. Indeed, the petitioners do not complain that they lacked notice that a certificate of analysis would be introduced at trial unless they took

certain steps to ensure the presence of the analyst.[3] Virginia law satisfied the need for notice.

The petitioners' principal contention is that the "demand" provisions of the former Virginia statute are inadequate because they required a defendant to issue a "subpoena" for the analyst. In their view, *Virginia Code* § 19.2-187.1 was a "subpoena statute" of the type that this Court invalidated in *Melendez-Diaz*, 129 S. Ct. at 2540. Pet. Br. 10. This premise is simply wrong. The Supreme Court of Virginia construed *Virginia Code* § 19.2-187.1 in a way that obviated the constitutional difficulty associated with a pure "subpoena statute." The construction of a Virginia statute by the Supreme Court of Virginia is final and binding, even on this Court. *See, e.g.*, *Wisconsin v. Mitchell*, 508 U.S. 476, 483 (1993) ("There is no doubt that we are bound by a state court's construction of a state statute.").

The statute itself is ambiguous. *Virginia Code* § 19.2-187.1 provides that the forensic "witness shall be summoned and appear at the cost of the Commonwealth." It does not specify who must subpoena the forensic analyst. Resolving this ambiguity, the Supreme Court of Virginia construed the statute to provide that a defendant can "insure[ ]

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[3] To the extent a defendant was represented by an attorney who did not grasp the obvious consequences of failing to request the presence of the analyst, the remedy lies in habeas corpus, not in a declaration that the former statute was invalid.

the physical presence of the forensic analysts at trial by issuing summons for their appearance at the Commonwealth's cost, *or asking the trial court or Commonwealth to do so.*" App. 200 (emphasis added).[4] So construed, the Virginia statute does not function as a pure "subpoena statute." A defendant had the option of making a demand for the prosecution to produce the analyst for trial.[5]

On September 1, 2009, the Court of Appeals of Virginia confirmed this reading of the statute. In *Grant v. Virginia*, 682 S.E.2d 84 (Va. Ct. App. 2009),

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[4] The Supreme Court of Virginia consistently has construed statutes to obviate constitutional problems. *See Virginia v. Doe*, 682 S.E.2d 906, 908 (Va. 2009) ("courts have a duty when construing a statute to avoid any conflict with the constitution. . . . [and] whenever possible, we will interpret statutory language in a way that avoids a constitutional question.") (citing cases).

[5] Virginia's former statutory scheme did not specify when a defendant must make a demand for the analyst to be present. However, "[i]t is a general rule of wide acceptation that, when no particular time is specified for the exercise of a right or privilege, the law presumes that a reasonable time was intended." *In re Edwards*, 130 So. 615, 617 (Fla. 1930). *See also Hays v. Arizona Corp. Comm'n*, 409 P.2d 282, 284 (Az. 1965); *Niles v. Boston Rent Control Adm'r*, 374 N.E.2d 296, 305 (Mass. App. Ct. 1978) ("In the absence of a time period specified by statute, the time allowed . . . is a 'reasonable time,' which 'is to be determined from the facts and circumstances of each particular case.'") (citation omitted). There is no issue in the case at bar concerning the timing of the demand for the analyst's presence. The petitioners made no demand at all until the middle of trial, obviously too late to ensure the presence of the analyst.

the defendant was charged with driving while intoxicated. Before trial, he made a written demand that the prosecution produce the forensic analyst who had performed the analysis of his blood alcohol. *Id.* at 86. Despite this written demand, the prosecution did not produce the analyst. *Id.* When the defendant objected at trial to the introduction of the certificate of analysis, the trial court concluded that the defendant had not complied with *Virginia Code* § 19.2-187.1 "because he had not subpoenaed the breath test operator." *Id.*

On appeal, the Court of Appeals of Virginia unanimously reversed. The court held, and Commonwealth conceded, that the defendant

> [c]omplied with the requirements of Code § 19.2-187.1 and did not waive his right to confront the person who prepared the certificate. In *Magruder*, our Supreme Court clarified that a criminal defendant could insur[e] the physical presence of the forensic analysts at trial" under Code § 19.2-187.1 "by issuing summons for their appearance at the Commonwealth's cost, *or asking the trial court or Commonwealth to do so.*" *Magruder [v. Virginia]*, 275 Va. [283,] 298, 657 S.E.2d [113,] 120-21 [(2008)] (emphasis added). Here, Grant notified the Commonwealth "that he desire[d] that the preparer of the certificate . . . *be summoned by the Commonwealth to appear at trial* . . . at the cost of the Commonwealth to be cross-examined in this matter." (Emphasis

> added). Grant did what our Supreme Court instructed in *Magruder*, and, accordingly preserved his right to confront the preparer of the certificate.

682 S.E.2d at 89.[6] Accordingly, the petitioners' claim that (1) "Virginia's statutory scheme shifts the consequences of adverse-witness no-shows from the State to the accused," and (2) permits the prosecution to "present the witness's testimonial statement without producing the witness at trial" is patently devoid of merit. Pet. Br. 17.

Virginia law does not improperly conflate the right of compulsory process with the right to confrontation. All a defendant must do is make a demand within a reasonable time that the prosecution produce the analyst. If the prosecution fails to do so, *Grant* shows that the prosecution will bear the consequences of its failure to produce the analyst. Here, however, the petitioners waived their right to confront the analyst because, unlike the defendant in *Grant*, they took no steps prior to trial to demand the analyst's presence. Had they done so, it would have been incumbent on *the prosecution* to have the analyst present for trial. A failure by the prosecution to produce the analyst would have resulted in the exclusion of the certificate of analysis from the evidence.

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[6] There will be no further appeals in *Grant*. The case has been remanded for a retrial.

B. The Court should decline to provide an advisory opinion based on purely hypothetical scenarios.

In addition to their erroneous characterization of the statute as a "subpoena statute," the petitioners rest their remaining arguments upon two assumptions. First, the petitioners assume that they would have been forced to examine the forensic analyst as an adverse witness during the defense case, rather than during the prosecution's case-in-chief. Pet. Br. 15-16, 20-21. Second, they assume that the prosecution would have been permitted to introduce the certificate of analysis into evidence before the defense could cross-examine the analyst. Pet. Br. 20.

These arguments are entirely speculative. The petitioners never took the first step of ensuring the presence of the analyst, either by issuing a defense subpoena or by asking the prosecution to produce the witness. As a consequence, the analyst was not present at trial. The petitioners were neither forced to cross-examine the analyst as part of the defense case, nor did the trial court have to make any ruling regarding whether the certificate of analysis could be admitted prior to the live testimony of the forensic analyst. As the Supreme Court of Virginia observed,

> [b]ecause the defendants did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic

> analyst as a witness. In other words, no defendant said to the respective circuit court, "the forensic analyst is here to testify but the Commonwealth must first call the witness." . . . [T]he trial court never had occasion to address the proper order of proof.

App. 205 (citation omitted).

Reinforcing the speculative nature of the petitioners' argument is the fact that once an analyst is produced, most prosecutors will call the witness as part of their case-in-chief. This is so for a variety of obvious tactical reasons. It clearly is advantageous for the prosecution to be the first to question the witness, to shape the factfinder's first impression of the witness. The prosecution will want to establish the education and experience of the forensic analyst, the straightforward nature of the scientific analysis of the drug sample or the blood sample, and the extensive safeguards that ensure the accuracy of the analysis. Furthermore, prosecutors will want to avoid the impression that they have "something to hide" by failing to call the analyst and to diffuse any points the defense might wish to make. "[T]the failure to call an available, friendly witness creates a bad impression, no matter what the technical legal result may be." Hilton Spellman, DIRECT EXAMINATION OF WITNESSES 62 (1968). *See also United States v. Brooks*, 928 F.2d 1403, 1412 (4th Cir. 1991) ("If a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the

presumption that the testimony, if produced, would be unfavorable."). This especially is true if there is any weakness that the defense might wish to exploit. "The better course, unless good reason to the contrary exists, is to recognize and dispose of the possible attack on cross-examination while the witness is still under direct examination and the party producing the witness can place the testimony of the witness in its true light and can, at the same time, deprive the cross-examiner of a means of attacking the witness." Charles W. Fricke, PLANNING AND TRYING CASES 301-02 (1957). Indeed, there is no compelling reason for a prosecutor to give defense counsel the first chance to examine the analyst.

When the prosecutor calls the forensic analyst as part of the prosecution's case-in-chief, as would likely occur if the defendant makes a timely demand for the analyst to be produced, and the defendant proceeds with cross-examination, there is no arguable constitutional violation. Although the statute *permits* the defendant to call the analyst as an adverse witness during the defense case, nothing in the statute *forbids* the prosecution from calling the analyst as part of the prosecution's case-in-chief.

Just as a prosecutor has good reasons to ensure the analyst is called during the prosecution's case-in-chief, so does the trial court. Virginia judges have "great latitude . . . as to the order in which witnesses may be called and the manner of their examination." *Williams v. Virginia*, 360 S.E.2d 361, 367 (Va. 1987). When faced with an objection by

defense counsel that the Constitution requires the prosecution to call the analyst as its witness, a trial judge likely would exercise this broad discretion and compel the prosecution to call the analyst as part of the prosecution's case-in-chief. Certainly, nothing in the statute precludes the trial court from exercising its discretion to compel the prosecution to call the analyst during the prosecution's case. In fact, doing so obviates any due process or other argument for reversal on appeal.

As for the petitioners' complaint that the certificate of analysis would have been admitted into evidence before the testimony of the analyst, the contention is again pure speculation. Sound tactical reasons and widespread Virginia practice suggest that, once a defendant has made a demand for the prosecution to produce the analyst, the prosecution will present the testimony of the analyst, who will then authenticate the exhibit. It is possible, but not likely, that the court would have allowed, over the defendant's objection, the admission of the certificate prior to the analyst's testimony. Most trial courts and prosecutors, however, will be reluctant to inject an appellate issue into the case, especially when the issue easily can be diffused by having the analyst testify before the certificate is introduced into evidence. Again, nothing in the statute prohibits the prosecution or the trial court from waiting until the

analyst has testified before allowing the certificate of analysis into evidence.[7]

This Court has declined to provide advisory opinions based on abstract, hypothetical scenarios. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). *See also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (courts should neither "anticipate a question of constitutional law in advance of the necessity of deciding it" nor "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied"). Virginia's former statutes should not be declared invalidated because they *might have been applied* in some unconstitutional way. Reversal is warranted only if a defendant's rights actually were infringed.

Moreover, because the petitioners seek the invalidation of the statute *in toto*, they are in effect raising a facial challenge. Such challenges are "disfavored" for many reasons. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008). Among other problems, facial challenges "often rest on speculation." *Id.* That infirmity is evident here. The petitioners raise hypothetical complaints about the factfinder's

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[7] As a textual matter, *Virginia Code* § 19.2-187 provides that a properly authenticated, timely filed certificate of analysis is admissible in court. The statute does not specify at what point in the case the certificate is admitted into evidence in the situation where the forensic analyst actually testifies in person.

perception or tactical choices the defense may have to make in a different case not before the court. Pet. Br. 18-24. The petitioners here were not forced to call the analyst as part of their defense case because the petitioners failed to take the first step of making a timely demand for the prosecution to produce the analyst. If a future litigant is forced to call an analyst as part of the defense case, after the certificate of analysis has been introduced, that litigant can properly raise an "as applied" challenge in that specific case. The petitioners' demand for facial invalidation should be rejected.

The petitioners failed to make a timely demand for the prosecution to produce the analyst. A simple demand, oral or in writing, within a reasonable time before trial was all that was required. Because the petitioners failed to make this demand, they waived their right to confront the analyst.[5]

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[5] Owing to the speculative nature of these arguments and the petitioners' erroneous characterization of the statute as a subpoena statute, the Court may wish to dismiss the case as improvidently granted.

II. BY PROVIDING A DEFENDANT WITH THE OPPORTUNITY TO CROSS-EXAMINE A WITNESS WHO IS FACE-TO-FACE, UNDER OATH, VIRGINIA LAW SATISFIED THE DEMANDS OF THE CONFRONTATION CLAUSE.

For the reasons above, the Court need not reach the issue of whether the Confrontation Clause demands a particular sequence of witnesses. In the event the Court reaches the issue, however, Virginia's former statutes did not violate the Confrontation Clause. The statute at issue requires the prosecution, upon demand by the defendant, to produce the analyst. Once the analyst is produced, the defendant might be required to question the analyst during the defense's case-in-chief, or the prosecution may take the initiative and adduce the testimony during the prosecution's case-in-chief. Such a statute does not violate the Confrontation Clause.

This Court has held that the Confrontation Clause offers three distinct but interrelated protections. "[T]he traditional protections of the oath, cross-examination, and opportunity for the jury to observe the witness' demeanor satisfy the constitutional requirements." *United States v. Owens*, 484 U.S. 554, 560 (1988) (citing *California v. Green*, 399 U.S. 149, 158-61 (1970)). *See also Mattox v. United States*, 156 U.S. 237, 244 (1985) ("The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him

to the ordeal of a cross-examination."). All three protections are provided by the Virginia statute. Had petitioners availed themselves of the right to demand the State to produce the analysts, and then called the analysts as adverse witnesses, the analysts would have testified under oath, been cross-examined, and had their demeanors observed by the factfinder.

More recently, in *Crawford*, this Court concluded, after a careful analysis of the roots of the Confrontation Clause, that "[t]he historical record also supports [the following] proposition: that the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." 541 U.S. at 53-54. *See also Crawford*, 541 U.S. at 59 n.9. ("[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."). Under Virginia's scheme, the witness *does* "appear at trial" and the defendant is given the opportunity to cross-examine the witness under oath, face-to-face.[9]

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[9] Virginia does not dispute that, absent a waiver under a notice and demand statute, testimonial evidence requires live testimony by the witness. However, the Confrontation Clause does not require that this testimony come at any particular point during the trial, nor does it require that the prosecution be the first to examine the witness.

The issue then becomes whether the Confrontation Clause *additionally* requires the prosecution to present the witness's testimony during the prosecution's case-in-chief and before any exhibits associated with that witness's testimony have been introduced into evidence. *Melendez-Diaz* did not resolve these questions. To be sure, this Court noted that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Melendez-Diaz*, 129 S. Ct. at 2540. The point of that section of the opinion, of course, was to make clear that a defendant's "ability to subpoena the analyst" under the Compulsory Process Clause "is no substitute for the right of confrontation." *Id.* Therefore, the prosecution had to "present" or "produce" its witnesses to provide the defendant with an opportunity to cross-examine them, rather than falling back on the defendant's right to compulsory process. *Melendez-Diaz* did not purport to hold that permitting a defendant to cross-examine a witness before the prosecution examined the witness necessarily violated the Confrontation Clause.

A. The constitutional text alone does not resolve the issue.

The petitioners chiefly make a textual argument, contending that "the use of the passive voice in the Confrontation Clause is not adventitious." Pet. Br. 14. In their view, the Framers deliberately chose the words "*be confronted* with the witnesses against him"

to protect a particular sequence of witness examination, *i.e.*, direct examination by the prosecution, followed by cross-examination. Neither the plain language of the clause nor its drafting history support the argument that the Framers of the Sixth Amendment were concerned with a sequence of witnesses.

First, as a matter of plain language, the term "be confronted with the witnesses against him" does not clearly mean, as petitioners contend, "be presented in the prosecution's case-in-chief." Justice Harlan concluded that "[s]imply as a matter of English the clause may be read to confer nothing more than a right to meet face to face all those who appear and give evidence at trial." *Green*, 399 U.S. at 175 (Harlan, J., concurring). In the view of Justices Douglas, Brennan, and Marshall, "[t]he right 'to be confronted with the witnesses against' him—the right of confrontation in the popular sense—means a 'face-to-face' meeting." *Tacon v. Arizona*, 410 U.S. 351, 353 (1973) (*per curiam*) (Douglas, Brennan, and Marshall, J.J., dissenting).[10] In common parlance, when a person sets out to "confront" someone, it signals a face-to-face encounter. To "be confronted"

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[10] *See also* Erwin N. Griswold, *The Due Process Revolution and Confrontation*, 119 U. PA. L. REV. 711, 728 (1971) ("Like all good constitutional provisions, the crisp language of the confrontation clause turns out to be somewhat cryptic. It requires thoughtful consideration and application in the light of its historical origins.").

simply means that the prosecution must ensure the presence of the witness for the confrontation to occur; it does not signify who must first question the witness.

Second, the historical record does not support the notion that the words of the Confrontation Clause were carefully chosen with a view toward protecting a particular sequence of witness examination. As Justice Harlan famously observed, the Confrontation Clause "comes to us on faded parchment." *Green*, 399 U.S. at 174 (Harlan, J., concurring). James Madison prepared the draft of what became the Sixth Amendment. Francis H. Heller, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 29-34 (1951). Madison proposed that the accused have the right "to be confronted with his accusers and with the witnesses against him." *Id.* at 30. The only change to his proposal was the deletion of the language "with his accusers." It is not clear why this change was made, nor does the Congressional history shed any light on the precise meaning Congress attributed to these words. *Id.* at 33.

> The available information thus permits only the following limited conclusion as to the immediate genesis of the Sixth Amendment: in its basic structure, compactness of arrangement, and enumeration of rights the amendment follows the recommendation of the ratifying convention of Virginia, which in turn was but an amplification of the

> corresponding section of the Bill of Rights drawn up by George Mason.

Id. at 34.[11]

"The Constitution's text does not alone resolve this case." *Crawford*, 541 U.S. at 42. Therefore, the Court must "turn to the historical background of the Clause to understand its meaning." *Id.* at 43.[12]

B. The evils targeted by the Confrontation Clause have nothing to do with who first questions a witness or at what point during a trial an item is introduced into evidence.

In *Crawford*, the Court looked to a variety of historical sources to determine the meaning of the Confrontation Clause. Those sources—including the colonial experience with vice-admiralty courts, the notorious treason trials of Sir Walter Raleigh, state constitutions, and Framing-era treatises—revealed

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[11] Professor Howard writes that the Virginia provision was adopted for the purpose of "preventing the trial of criminal cases upon affidavits or depositions" and protects the right of the accused to be present at his trial and to cross-examine witnesses. 1 A.E. Dick Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 102, 104 (1974).

[12] Given the sparse and ambiguous text, this Court, of necessity, has turned to historical practice to ascertain the scope of the Clause in other contexts as well. *Mattox*, 156 U.S. at 244 (transcript from prior trial); *Crawford*, 541 U.S. at 56, n.6 (dying declarations and business records); *Giles v. California*, 128 S. Ct. 2678, 2683 (2008) (forfeiture by wrongdoing).

that the Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence . . . but about how reliability can best be determined." 541 U.S. at 61. A review of those sources further reveals that the Clause is not concerned with the structure of criminal trials and the order by which witnesses are examined. The common law confrontation right was concerned with ensuring defendants the opportunity to cross-examine witnesses against them, a right fully protected by the Virginia statute.

1. The colonial experience in the royal vice-admiralty courts does not support the petitioners' "sequence of witnesses" argument.

The experience of the colonies with the British vice-admiralty courts constitutes one of the principal moving forces for the enactment of the Confrontation Clause. Local courts often acquitted colonists charged with violating laws designed to raise revenue and restrict trade, in spite of the obvious guilt of the accused. Daniel H. Pollitt, *The Right of Confrontation: Its History and Modern Dress*, 8 J. PUB. L. 381, 395-96 (1959). In response, the Crown shifted these trials to the vice-admiralty courts, where "trials were before judge without jury, and testimony by depositions was commonplace." *Id.* at

397. Such trials, "instituted by secret informants where adverse evidence was by deposition or given in private before the judge, reawakened in the colonists the need to assert what were considered to be the inalienable rights of Englishmen." *Id.* *See also Crawford*, 541 U.S. at 47-48 (discussing abuses by vice-admiralty courts).

The objection to these courts did not stem from the fact that the defense was required to first question the witness or that a written statement from the witness might be admitted prior to the witness's testimony. Rather, it was because, as the Continental Congress explained in a letter to the inhabitants of Quebec in 1774, "neither life, liberty, nor property can be taken from the possessor" until there has been a "full enquiry, face-to-face, in open court." Letter by the First Continental Congress to the Inhabitants of the Province of Quebec, October 26, 1774 (quoted in Pollitt, 8 J. PUB. L. at 398).

2. The notorious treason trials of England do not support the petitioners.

The precursors to the vice-admiralty courts were the historic treason trials of England, most notably of Sir Walter Raleigh. The problems associated with these trials do not support the notion that the Confrontation Clause requires a witness to be questioned first by the government. To the contrary, the confrontation right guaranteed to Raleigh was

that he could "require" his accuser to be "brought forth" to make the accusation in person, not that the "confrontation" happen at a particular point in the trial. *See* 1 & 2 Philip & Mary, c. 10 (1554) and 1 Eliz., c. 1 § XXXVII (1558) (quoted in Pollitt, 8 J. PUB. L. at 388 n.26). The great shortcoming in Raleigh's trial was that his accuser, Lord Cobham, could not be examined at all, despite strong indications that he may have confessed under torture or to save his life. *Crawford*, 541 U.S. at 44. Raleigh would have been delighted to have *any* opportunity to question Cobham face-to-face concerning his written confession. Similarly, the defendants in other noteworthy treason trials made demands for a "face-to-face" encounter with a witness. Sir James Fitzjames Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century*, in 2 SELECT ESSAYS IN ANGLO AMERICAN LEGAL HISTORY 443, 506 (1908) (discussing trial of Quaker preacher John Lilburne). The flaw in these trials again was the *ex parte* use of affidavits with no opportunity to cross-examine the witness—not having the chance to cross-examine the witness only during the defense case.

3. State constitutions adopted in the wake of independence do not support the petitioners' "plain language" argument.

Following the declaration of independence, States enacted a number of provisions designed to prevent

the abuses associated with the vice-admiralty courts. Four of these constitutions protected a right to "be confronted" with witnesses. Del. Decl. of Rights § 14 (1776); Md. Decl. of Rights § 19 (1776); Pa. Const. § 9 (1776); Va. Const. § 8 (1776). In contrast, the Massachusetts clause, whose chief author was John Adams,[13] as well as New Hampshire, protected the right of an accused "to meet the witnesses against him face-to-face." Mass. Const. § 12 (1780); N.H. Const. Art. I, § 15 (1784). North Carolina's Constitution provided that "[e]very man has a right . . . to confront the accusers and witnesses with other testimony." N.C. Const., Decl. of Rights § 7 (1776).

These various formulations all took aim at the same problem. There is no indication that the wording chosen for these clauses signaled an intent on the part of the States to provide distinct procedures or protections. During the ratification debates, one critic of the proposed United States Constitution lumped these state provisions together, observing that

> [f]or the security of life, in criminal prosecutions, the bills of rights most of the states have declared, that the witnesses against him shall be brought face to face and he shall be fully heard by himself or counsel. . . . Are not provisions of this kind as

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[13] Ronald M. Peters, Jr., THE MASSACHUSETTS CONSTITUTION OF 1780 13, 23 (1974).

> necessary in the general government, as in that of a particular state?

XIII THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION, doc. No. 221, p. 527, Brutus No. 2, published 1787 (2003).[14] The same historical experience informed the passage of these variously worded constitutional provisions. Madison chose the "be confronted" phrasing not to distinguish the Sixth Amendment from other state constitutional provisions. Instead, he simply turned to the familiar language from the constitutional provision of his home State.

4. Contemporaneous treatises do not tie the importance of live examination of witnesses to any particular order of witnesses or sequence of introducing evidence.

Discussing civil trials, William Blackstone contrasted the inquisitorial method with the open examination of the witnesses favored in England:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth,

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[14] *Cf. Johnson v. State*, 10 Tenn. (2 Yer.) 58 (1821) (irrespective of the different wordings of North Carolina Constitution, which protected a right "to confront the accusers and witnesses" and the Constitution of Tennessee, which protected "a right to meet the witnesses face-to-face," "the expression in both means the same thing").

> than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private, which he will be ashamed to testify in a public and solemn tribunal. . . . Besides, the occasional questions of the judge, the jury and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.

3 William Blackstone, *Commentaries on the Laws of England* 373-74 (1768).

Another influential writer, Sir Matthew Hale, praised the "open Course of Evidence to the Jury in the Presence of the Judges, Jury, Parties and Council." Matthew Hale, THE HISTORY OF THE COMMON LAW OF ENGLAND 163 (Charles M. Gray ed. Univ. of Chi. Press 1971) (1713). This procedure provided "Opportunity for all Persons conern'd" to question the witness and "Opportunity of confronting the adverse Witnesses." *Id.* at 164.

There is no indication that these writers were preoccupied in the least with who first questioned a witness or at what point in the trial a documentary exhibit might be read or produced for the jury.

5. The Confrontation Clause was not designed to displace the flexibility that characterized colonial trials.

Cases around the time of the founding typically proceeded with the prosecution's witnesses, to be followed by any defense witnesses. *See, e.g.*, 3 William Blackstone, *Commentaries* 367 (describing trials as beginning with one side presenting evidence, followed by the adverse case and then a reply). However, there is no evidence that the Framers attributed any particular importance to this sequence of events. Indeed, compared to modern trial practice, "[t]he colonial trial was far more informal and dynamic." Daniel D. Blinka, *Trial by Jury on the Eve of Revolution: the Virginia Experience*, 71 UMKC L. REV. 529, 568 (2003).

> For the most part witnesses testified in "narrative" form, that is, he or she related what they "knew" about an event unimpeded by the "Q and A" characteristic of contemporary trials. The party who called the witness might ask pertinent questions, following which the opponent had the opportunity to cross-examine. Judges interceded freely, compared to their modern counterparts, often with pointed questions that revealed their predisposition about a case. It also appears that jurors occasionally asked questions, although the extent of this practice is impossible to determine.

Id. at 568-69.

The "Boston Massacre" trials of British soldiers in 1790 illustrate this flexibility. "[W]itnesses were not sequestrated, but remained in open court during the taking of other testimony; . . . witnesses were called out of order (Crown witnesses were called in the middle of the defense's case); [and] rebuttal witnesses were called immediately, to refute specific segments of testimony." The Boston Massacre Trials, *in* 2 LEGAL PAPERS OF JOHN ADAMS 27 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

The treason trial of Aaron Burr, over which Chief Justice John Marshall presided, offers a further illustration of the flexibility of trial practice. 1 REPORTS OF THE TRIALS OF COLONEL AARON BURR FOR TREASON (1808). Occasionally, the first question for a prosecution witness would come from the defense. The prosecution at times would interrupt the defense's cross-examination with questions. Conversely, defense counsel, and the defendant himself, would interrupt the prosecution's direct with questions. Sometimes the jurors would ask questions. *See generally id.* at 474-91 (examination of William Eaton) and 505-14 (examination of Thomas Morgan). This procedure would be highly unusual in a modern trial. However, there is no evidence that this flexibility was viewed as problematic or that the Confrontation Clause was designed to displace the flexibility that characterized trials around the time of the framing.

6. The petitioners' expansive reading of the protections of the Confrontation Clause would take the Clause far beyond its historical moorings.

The petitioners devote a large section of their brief to the imagined evils that flow from their description of Virginia's statutory procedure. They contrast a typical modern trial with the tactical disadvantages that might flow from what they erroneously characterize as a "subpoena statute." Pet. Br. 13-29. This Court's role, however, is not to fashion the fairest or best procedures for state criminal prosecutions. *Spencer v. Texas*, 385 U.S. 554, 564 (1967) (this Court does not function "as a rule-making organ for the promulgation of state rules of criminal procedure"). The question before the Court is whether Virginia's former statutory scheme violated the Confrontation Clause. Absent an indication that the Confrontation Clause was ratified to prevent the tactical problems identified by the petitioners, these supposed problems, real or imagined, cannot result in the invalidation of a statute as unconstitutional. There is no indication that the Confrontation Clause was designed to avoid "time gaps" in testimony, Pet. Br. 18, to obviate "raising expectations," Pet. Br. 22, to afford a defendant "a clean, uncluttered argument," Pet. Br. 24, or, of all things, to prevent defense counsel from "look[ing] foolish," Pet. Br. 22. Nor is there any evidence that the Clause was designed to provide the defendant an opportunity to

argue for a directed verdict at the close of the prosecution's case. Instead, the Confrontation Clause "was meant to constitutionalize a barrier against flagrant abuses, trials by anonymous accusers, and absentee witnesses." *Green*, 399 U.S. at 179 (Harlan, J., concurring).

If the Court accepts the petitioners' arguments, routine trial decisions would be swept into the orbit of the Confrontation Clause. For example, if a court breaks for lunch or for the day following the direct examination of a witness, does that "time gap," between direct and cross-examination create a confrontation problem? The petitioners suggest that it does. Pet. Br. 18. Or suppose that a trial court, for reasons of efficient trial management, requires a defendant to call one of his witnesses before the conclusion of the prosecution's case. Perhaps an expert witness for the prosecution is not present when expected because her flight has been delayed, or perhaps the witness is temporarily stuck in traffic. The petitioners suggest that this displaced sequence of examination injects a Confrontation Clause error into the case. Pet. Br. 20.

There is no doubt that trial procedures have benefitted from modern developments. State and federal courts have adopted rules of evidence and criminal procedure. Defendants also are afforded discovery of certain evidence. These measures make trials far more orderly. These modern rules and statutes governing the operation of trials, beneficial as they may be, do not raise the constitutional floor.

C. The petitioners' remaining criticisms of the Virginia statute are without merit.

1. The petitioners' burden of proof and fundamental fairness arguments fall within the Due Process Clause, not the Confrontation Clause.

The petitioners contend that "[i]f the accused were forced to call adverse witnesses, '[u]ltimately the effect could be to blur the presumption of innocence and the principle that the burden of proof on the prosecution 'never shifts throughout the trial.'" Pet. Br. 14 (citation omitted). *See also* Pet. Br. 24 (claiming that Virginia's scheme "work[s] a fundamental transformation in traditional criminal procedure" and "forces a defendant to abandon (or at least severely undercut) the burden-of-proof argument."); *Wigglesworth v. Oregon*, 49 F.3d 578, 581 (9th Cir. 1995) (allowing defendant to cross-examine analyst after certificate of analysis is introduced violates due process). Boiled down to its essence, the petitioners' argument is that the statutes at issue are fundamentally unfair to a defendant.

Although Virginia disagrees with this conclusion,[15] arguments about diluting the burden of

[15] Providing for the defense to first examine the analyst can actually be advantageous to a defendant. When the prosecution first examines the analyst, the direct examination will establish the analyst's credentials and experience, the scientific nature of the test, and the elaborate safeguards in place in the laboratory.

(Continued on following page)

proof and criticism of trial procedures as fundamentally unfair sound in due process, not confrontation. It is the Due Process Clause that "guarantees the fundamental elements of fairness in a criminal trial," *Spencer*, 385 U.S. at 563-64, and that ensures the burden of proof remains with the prosecution. *See, e.g., In re Winship*, 397 U.S. 358, 361-64 (1970) (Due Process Clause requires proof beyond a reasonable doubt in juvenile proceedings). In *Melendez-Diaz*, this Court addressed the improper conflation of two Constitutional guarantees: the right of compulsory process and the right of confrontation. 129 S. Ct. at 2540. Just as the Confrontation Clause should not be conflated with the distinct right of compulsory process, neither should it be conflated with the Due Process Clause.

Any due process issues that might arise when a defendant is actually forced to call the analyst during the defense case should be saved for another day. The question presented does not raise any due process issue, nor would such an issue be fairly encompassed

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At the conclusion of this examination, the factfinder will most likely have a very favorable impression of the witness and of the analysis. In contrast, when the defendant has the first opportunity to examine the witness, the defendant can hone in on specific problems in a particular case and force the prosecution to explain those away. Furthermore, given the routine nature of the scientific testing, the timing of the analyst's testimony is unlikely to make any difference to the outcome in the vast majority of the cases. This is particularly true where, as here, the factfinder is a judge rather than a jury.

within the question presented. Ordinarily, this Court will "not consider questions outside those presented in the petition for certiorari." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). This rule is prudential in nature, but the Court will disregard it "only in the most exceptional cases." *Stone v. Powell*, 428 U.S. 465, 481 n.15 (1976). There is no reason to disregard the rule here.

Moreover, the petitioners never raised any due process issue in the court below. Therefore, even if Virginia's superseded statutory scheme raised a due process concern, a point Virginia does not concede, that does not help the petitioners. "It is 'the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.'" *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)).

2. The prosecution established the chain of custody.

The petitioners also complain about the statutes' impact on proof of chain of custody. Pet. Br. 25. With respect to chain of custody, *Virginia Code* § 19.2-187.01 provides that the certificate of analysis is "prima facie evidence . . . as to the custody of the material described therein from the time such

material is received by an authorized agent of [a] laboratory until such material is released. . . ." This statute does not address chain of custody outside the laboratory. *Melendez-Diaz* reiterated the settled law that not every link in the chain of custody must be established. 129 S. Ct. at 2532 n.1. Instead, such questions go to the weight of the evidence, not its admissibility. *Id.*

In Cypress's case, the arresting officer explained that he sealed the evidence and locked it in the police vault. He later personally took it to the laboratory and observed as the receptionist wrote his name on the sealed package. App. 102-03. He identified the bags at trial, which contained a mixture of rice and cocaine, as the ones he seized at the scene. App. 100-01. The officer who seized the drugs in Briscoe's case also sealed the drugs in a heat-sealed plastic evidence envelope, marked it, placed the items in the police property room, and later transported them to the forensic lab. App. 28-31. The defendant's name, the police department's case number, and the forensic lab numbers on the certificate of analysis all matched the evidence seized at the scene. App. 30-31.[16] These

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[16] In Virginia, when a police officer drops off suspected drugs for testing at a state laboratory, the established protocol calls for the person receiving the drugs to affix a bar-coded sticker to the container enclosing the sample. The sticker bears a unique case number from the Department of Forensic Science. An identical sticker is also affixed to the Request for Laboratory Examination (RFLE) form. The RFLE form, which includes the name(s) of the suspect(s), the date the item was received by the

(Continued on following page)

numbers were unique to this case and to these pieces of evidence. App. 30. The testimony of the officers provided all the assurance that was needed to establish that the items seized were the items tested.

Moreover, although the petitioners contend that the chain of custody is "crucial," Pet. Br. 25, they raised no issue with respect to chain of custody in their briefs to the Supreme Court of Virginia. Instead, the petitioners' argument was that they were denied the opportunity to confront the analyst. The court below was never called upon to address the propriety of Virginia's statutory scheme with respect to chain of custody. The petitioners should not be permitted to raise an issue that was neither presented nor passed upon in the court below. *Stincer*, 482 U.S. at 747 n.22.

Virginia's former statutory scheme provided the petitioners with the opportunity to cross-examine the analyst, face-to-face, under oath, in open court. To exercise those rights, all the petitioners had to do was to make a timely demand for the prosecution to produce the analyst. Nothing more was required to satisfy the Confrontation Clause.

Department of Forensic Science, and the case number assigned by the submitting law enforcement agency, is stapled to the evidence container. When the certificate of analysis bears the same unique case number, police department case number and the suspect's name as that found on the sample, the factfinder can draw a reasonable inference that the item submitted is the item that was tested.

CONCLUSION

The judgment of the Supreme Court of Virginia should be AFFIRMED.

Respectfully submitted,

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MARK A. BRISCOE and SHELDON A. CYPRESS,

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Virginia

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. THE FORMER VIRGINIA SCHEME SHARES BOTH OF THE FATAL DEFECTS OF A SUBPOENA SYSTEM 2

A. The former Virginia statutory scheme is fatally defective in that it allows prosecutors to present affidavits rather than live testimony of witnesses..... 3

B. The former Virginia statutory scheme is fatally defective in that it requires the defendant who wishes to examine a prosecution witness, rather than the prosecution, to bear the risk that the witness will not appear at trial..... 16

II. THE DEFENDANTS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHTS BY DECLINING TO INVOKE VIRGINIA'S INVALID STATUTORY PROCEDURE 20

III. PROTECTING DEFENDANTS' CONFRONTATION RIGHTS DOES NOT IMPOSE AN UNDUE BURDEN ON THE STATES..... 24

IV. THE COURT SHOULD DECIDE THIS CASE ON THE MERITS – BUT IF IT DECIDES NOT TO, IT SHOULD VACATE AND REMAND FOR RECONSIDERATION IN LIGHT OF *MELENDEZ-DIAZ*..... 28

CONCLUSION..... 31

TABLE OF AUTHORITIES

Page

CASES

Barba v. California, 129 S.Ct. 2857 (2009) 29

Bordenkircher v. Hayes, 434 U.S. 357 (1978).....15

Bouie v. City of Columbia, 378 U.S. 347 (1964).....22

Brooks v. Tennessee, 406 U.S. 605 (1972) 7

Bruton v. United States, 391 U.S. 123 (1968).....12, 24

California v. Green, 399 U.S. 149 (1970).....10

Commissioner v. Estate of Bosch, 387 U.S. 456 (1967).....19

Crawford v. Washington, 541 U.S. 36 (2004) 9, 12, 13

Grant v. Commonwealth, 682 S.E.2d 84 (Va. Ct. App. 2009) 17, 18, 19, 23

Griffin v. California, 380 U.S. 609 (1965) 13

Hoover v. Beto, 439 F.2d 913 (5th Cir. 1971).....9

Johnson v. Zerbst, 304 U.S. 458 (1938) 21

Knox v. Lee, 79 U.S. 457 (1871).....6

Lawrence v. Chater, 516 U.S. 163 (1996) 29

Long v. State, 742 S.W.2d 302 (Tex. 1987), *cert. denied*, 485 U.S. 993 (1998).....9

Lowery v. Collins, 988 F.2d 1364 (5th Cir. 1993).....12

Lowery v. Collins, 996 F.2d 770 (5th Cir. 1993).....11

Maldonado v. Commonwealth, 2006 WL 3798583 (Va. Ct. App. 2006) 17

TABLE OF AUTHORITIES – Continued

Page

Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009) ..... *passim*

N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) 22

Norwood v. United States, 2009 WL 2134356 (U.S. Nov. 2, 2009) 29

Pointer v. Texas, 380 U.S. 400 (1965) 13

Reich v. Collins, 513 U.S. 106 (1994) 22

Schaal v. Gammon, 233 F.3d 1103 (8th Cir. 2000) 11

State v. Apilando, 900 P.2d 135 (Haw. 1995) 11, 13

State v. Belvin, 986 So.2d 516 (Fl. 2008) 12

State v. Birchfield, 157 P.3d 216 (Or. 2007) 13

State v. Fisher, 563 P.2d 1012 (Kan. 1977) 9

State v. Rohrich, 939 P.2d 697 (Wash. 1997) 9

State v. Snowden, 867 A.2d 314 (Md. 2005) 11, 12

Taylor v. Kentucky, 436 U.S. 478 (1978) 12

Thomas v. United States, 914 A.2d 1 (D.C. 2006), *cert. denied*, 552 U.S. 895 (2007) 25, 26

Virginia v. Black, 538 U.S. 343 (2003) 12

Wright v. Georgia, 373 U.S. 284 (1963) 22

CONSTITUTIONAL PROVISION

U.S. Constitution, VI Amendment ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Ala. Code 1975 § 12-21-32(b) 14

Alaska Stat. § 12.45.084 14

Cal. Evid. Code §§ 1370, 1380 12

Del. Code § 3516 12

German Code of Criminal Procedure §§ 243, 244 7

Idaho Code § 37-2745 30

725 Ill. Comp. Stat. § 5/115-10.3 12

La. Rev. Stat. Ann. § 15:501(B)(2) 14

Mich. Comp. L. Ann. § 768.27c 12

N.D. Cent. Code § 19-03.1-37 30

Or. Rev. Stat. § 40.460(18)(b) 12

Va. Code § 19.2-187 *et seq.* ..... *passim*

BOOKS AND ARTICLES

WILLIAM BLACKSTONE, COMMENTARIES 373 (1768) 8

Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – And an Alternative*, 107 MICH. L. REV. 711 (2009) 29

GEOFFREY GILBERT, EVIDENCE (1754) 8

EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE (9th ed. 2007) 29

TABLE OF AUTHORITIES – Continued

Page

CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES (1928) 6

John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1 (1983) 7

ANTHONY LEWIS, GIDEON'S TRUMPET (1964) 24

JOHN HENRY WIGMORE, EVIDENCE (Chadbourn rev. 1976) 8

OTHER AUTHORITIES

Brief for the Commonwealth, October 17, 2008, *Grant v. Commonwealth,* available at <http://www-personal.umich.edu/~rdfrdman/GrantVa.pdf> 18

Brief in Opposition to Petition for Appeal, July 17, 2008, *Grant v. Commonwealth*, available at <http://www-personal.umich.edu/~rdfrdman/Grant BIO.pdf> 18

Confronting Forensic Evidence: Implications of Melendez-Diaz v. Massachusetts *and* Briscoe v. Virginia Cite, Symposium at New England School of Law, Nov. 13, 2009, available at <http://www.nesl.edu/students/ne_journal_symposia_audio_2009.cfm> 27

Oral Argument, May 7, 2009, *Grant v. Commonwealth*, available at <http://www-personal.umich.edu/~rdfrdman/GrantvCW.MPG> 18

ARGUMENT

In *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009), this Court held that forensic laboratory reports are testimonial for purposes of the Confrontation Clause. The Court also held that the defendant's ability to subpoena the author of such a report does not satisfy the Clause: A subpoena procedure requires the defendant, rather than the prosecution, to present the live testimony of the witness, and it imposes the burden of witness no-shows on the defense.

The Virginia statutory scheme involved in this case, however one may label it, shares both these fatal defects. Approving it would not only severely undercut the confrontation right but fundamentally transform trial procedure as it has stood since before the time of the Founding. To their credit, the Governor and General Assembly of Virginia recognized the problem, and very promptly replaced the principal portion of the scheme by a statute that, *Melendez-Diaz* indicated, clearly satisfies the Constitution – a simple notice-and-demand procedure under which, if the defendant makes a timely demand, the prosecution must present the live testimony of the witness or forgo use of the certificate.

But in this case, Virginia, after trying to avoid the merits, tries to transform the defunct statutory scheme into what it transparently is not, a simple notice-and-demand statute. Its attempt to accomplish this feat relies in part on its attempt to cast aside a key aspect of *Melendez-Diaz*, the requirement that

the prosecution call prosecution witnesses to the stand. And in part it relies on a mischaracterization of dictum from an uncontested lower court case – a case in which, until *Melendez-Diaz* was decided, it insisted the scheme required a subpoena by the defendant.

The Court should not be taken in by this attempted alchemy. Nor should the Court be frightened into abandoning a precedent less than six months old. There is no evidence whatsoever that the holdings of *Melendez-Diaz* – that lab certificates are testimonial and that the prosecution rather than the accused bears the burden of producing prosecution witnesses at trial – are casting an undue burden on the states. On the contrary, the evidence shows clearly that the burden is modest. Some states – including some of the *amici* – already bore it, without prompting by this Court, before *Melendez-Diaz*. Any state wishing to minimize it can follow the lead of Virginia and adopt a simple notice-and-demand statute.

I. THE FORMER VIRGINIA SCHEME SHARES BOTH OF THE FATAL DEFECTS OF A SUBPOENA SYSTEM.

Two grounds led the *Melendez-Diaz* Court to reject the contention that the accused's ability to subpoena the witness is an adequate substitute for the confrontation right.

The "[m]ore fundamental" of the two grounds is that "the Confrontation Clause imposes a burden on

the prosecution to present its witnesses," live at trial, rather than "via *ex parte* affidavits." 129 S.Ct. at 2540. Virginia and the United States do not seriously deny that the former Virginia scheme imposed this burden on the accused. In effect, they ask the Court to turn its back on this aspect of *Melendez-Diaz*.

The other ground is that the ability to subpoena a witness is "of no use to the defendant when the witness is unavailable or simply refuses to appear"; such a procedure therefore "shifts the consequences of adverse-witness no-shows from the State to the accused." *Id.* Virginia no longer denies that such a burden shift is unconstitutional. But it contends – contrary to the clear statutory language and contrary to the position it asserted until after the decision in *Melendez-Diaz* and the grant of *certiorari* in this case – that its defunct scheme does not cause such a shift.

A. The former Virginia statutory scheme is fatally defective in that it allows prosecutors to present affidavits rather than live testimony of witnesses.

Under former § 19.2-187 of the Virginia Code, a "duly attested" certificate of a forensic laboratory analysis fitting within a prescribed category was admissible at trial to prove the results of the test it reported, provided that (1) the certificate was filed with the clerk seven days before trial, and (2) *if* defense counsel (a) anticipated that such a

certificate would be filed, and (b) made a request at least *ten* days before trial, a copy was mailed or delivered to counsel at least seven days before trial. A companion statute, § 19.2-187.01, still in force, provides that such a certificate is admissible to prove the chain of custody of the material described in it; this statute does not contain the proviso regarding filing and transmittal. A third provision, former § 19.2-187.1, provided that in any trial "in which a certificate of analysis is admitted into evidence" pursuant to the first two provisions, the accused "shall have the right to call the person performing the analysis or examination involved in the chain of custody as a witness therein, and examine him in the same manner as if he has been called as an adverse witness."

The plain meaning of the statutory language is that the certificate is admissible as part of the prosecution's case and that the accused may, if he wishes (and is able) present the analyst as his own witness as part of his case. And the Virginia Supreme Court explicitly declared that the statute should be read in accordance with its terms. ("At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them . . . ," JA 200). While offering speculation that perhaps the prosecutor would present the analyst as its witness if

the defense so demanded, Brief at 20, that is not the procedure provided by the statute.[1]

Virginia makes no real effort to reconcile this aspect of the statutory scheme with *Melendez-Diaz*. Nor could it plausibly do so, because the conflict is so clear. *Melendez-Diaz* holds explicitly that the author of a forensic lab report is a witness against the accused, 129 S.Ct. at 2533, and the consequence follows inevitably:

> While the Confrontation Clause guarantees a defendant the right to be confronted with the witnesses "against him," the Compulsory Process Clause guarantees a defendant the right to call witnesses "in his favor." U.S. Const., Amdt. 6. The text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter.

Id. at 2534 (footnote omitted). Thus, a system that relieves the prosecution of its obligation to present the live testimony of its witnesses is "fundamentally" flawed. "[T]he Confrontation Clause imposes a burden on the prosecution to present its witnesses," and "[i]ts value to the defendant is not replaced by a system in

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[1] And in fact when petitioners, in their bench trials, objected to presentation of the certificates absent the live testimony of the witness, Virginia made no attempt to present the witnesses or even to demonstrate that it could not feasibly be done.

which the prosecution presents its evidence via *ex parte* affidavits." *Id.* at 2540.

Virginia and the United States therefore ask the Court – albeit without saying so – to overrule this aspect of *Melendez-Diaz*.[2] They offer no plausible basis that would warrant this result.

Virginia and the United States attempt to trivialize the constitutional deficiency of the former Virginia statute by characterizing the issue as one over order of proof. That misses the essential point:

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[2] The other *amici* supporting Virginia, Indiana and twenty-five other states plus the District of Columbia, do explicitly ask the Court to overrule *Melendez-Diaz* in its entirety. Because Virginia does not ask for this result, which goes far beyond the question presented, we will not address the matter here. But the fact that *Knox v. Lee*, 79 U.S. 457 (1871), is the states' prize example of an overruling of a recent decision is notable, and casts an important light on Virginia's implicit request for a partial overruling. Charles Evans Hughes famously identified *Knox* as a decision that "brought the Court into disesteem," one of "three notable instances" in which "the Court has suffered severely from self-inflicted wounds":

> The action of the Court, taken soon after [the confirmation of two new justices], . . . the two new judges joining with the three judges, who had dissented in the *Hepburn* case, to make a majority, caused widespread criticism. From the standpoint of the effect on public opinion, there can be no doubt that the reopening of the case was a serious mistake and the overruling in such a short time, and by one vote, of the previous decision shook popular respect for the Court.

CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50-52 (1928).

The principal failing of the procedure is that it allows the prosecution to present the testimony of its witnesses through affidavits rather than by calling them to the stand as its own live trial witnesses.

Much of the argument in the briefs of Virginia and the United States is devoted to demonstrating, largely on historical grounds, an undisputed point – that the trial court has discretion to manage the proceedings, including considerable control over the order of proof. Thus, for example, there would be no constitutional difficulty if the court interrupted the testimony of another witness to allow a lab analyst to testify at a convenient time. Nor does a brief delay in cross-examination pose a constitutional problem.

But this housekeeping power does not mean that a trial court has discretion to impose any order whatever in a particular case. Nor does a state have the constitutional leeway to choose whatever procedure it chooses as a general matter. A state could not provide that a defendant must testify at the outset of the defense case,[3] or that all defense witnesses must testify first.[4] Nor could a state provide a general rule

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[3] *Brooks v. Tennessee*, 406 U.S. 605 (1972).

[4] *See, e.g.*, John H. Langbein, *Shaping the Eighteenth Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 130-31 (1983) (By the 1750s, "[o]ur sources show a consistently crisp division of testimony along partisan lines, inculpating evidence before exculpating," because to "test[ ] the prosecution case," counsel "had to know what the prosecution case was."); *compare* German Code of Criminal Procedure

(Continued on following page)

that there should be a three-week delay between direct and cross examinations, to allow the trier of fact to absorb and reflect on the direct testimony.[5]

And neither can a state provide that a prosecutor may present the testimony of its witnesses through affidavit, leaving it to the defendant, if he wishes to examine them, to call them to the witness stand. That proposition has been the rule for centuries,[6] it was the

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§§ 243, 244 (defendant examined before evidence taken from others).

[5] 6 JOHN HENRY WIGMORE, EVIDENCE 697 (Chadbourn rev. 1976) ("The cross-examination . . . *follows immediately* the direct examination, in the customary order prescribed by the common law"; though a postponement may be granted in the court's discretion "where fairness seems to require it," "the *opponent is entitled* to this *immediate sequence*, in order to expose without delay the weak points of the testimony against him"), *see also id.*, vol. 6, at 38.

[6] *E.g.*, GEOFFREY GILBERT, EVIDENCE 105 (1754) ("The Witness produced must first be examined on the part of the Producer, and then the other Side may examine him; and this is a Regulation that naturally follows the true Order of Things, for it is proper first to enquire what a Witness can prove before you are to examine what hath not fallen under his Knowledge."); 3 WILLIAM BLACKSTONE, COMMENTARIES 373 (1768) ("open examination of witnesses *viva voce* . . . is much more conducive" to truth determination than are "private and secret examinations taken down in writing"). That defendants were occasionally allowed to ask questions during the direct testimony, as occurred during the Aaron Burr trial, Brief of Respondent at 38, is of no significance; the essential point is that the prosecution presented its witnesses live as part of its case rather than by affidavit.

central focus of the Confrontation Clause,[7] and it remains the rule now.[8]

Thus, two major points stand out from the arguments made by Virginia and the United States. First, for all their trawling of historical sources, they have found no historical precedent – that is, none other than relatively recent statutory schemes resembling the one here – for a procedure like that involved in this case: They provide *not a single instance* in which a court allowed a prosecution witness to present evidence through an affidavit and held that the defendant's ability to call the witness to the stand sufficed. Petitioners have searched for cases

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[7] *Crawford v. Washington*, 541 U.S. 36, 50 (2004) ("the principal evil at which the Confrontation Clause was directed was . . . [the] use of *ex parte* examinations as evidence against the accused").

[8] *E.g., State v. Rohrich*, 939 P.2d 697, 700-01 (Wash. 1997) ("The opportunity to cross examine means more than affording the defendant the opportunity to hail the witness to court for examination. It requires the State to elicit the damaging testimony from the witness so the defendant may cross examine if he so chooses."); *Long v. State*, 742 S.W.2d 302, 320 (Tex. 1987), *cert. denied*, 485 U.S. 993 (1998) (noting lack of precedent for "a trial procedure that requires the defendant to call as a witness his accuser if he wants to question the witness."); *State v. Fisher*, 563 P.2d 1012, 1017 (Kan. 1977) ("calling a declarant as a defense witness is no substitute for cross-examining that declarant as a state's witness"); *Hoover v. Beto*, 439 F.2d 913, 924 (5th Cir. 1971) (noting that state might fear live testimony because of possible retraction or refusal to testify; to treat availability of witness as "the equivalent of putting him on the stand and subjecting him to cross-examination would severely alter the presumption of innocence and the burdens of proof").

in which the issue was even raised, but without success. The reason is not hard to discern: The idea that the prosecution could present its testimony by affidavit, so long as the defense had the ability to call the witnesses to testify live, was as unacceptable then as it is now.

Second, neither the United States nor Virginia provides any basis for resisting the conclusion that approving the burden-shifting procedure involved here would result in a fundamental transformation of the criminal trial. Neither one provides any basis for distinguishing, with respect to that procedure, forensic lab technicians from any other type of prosecution witness.[9] Approval of the procedure, therefore, would allow a state to present as its case nothing more than a pile of affidavits, audiotapes, and videotapes, so long as the prosecution could assure the presence of the witnesses at some later point during trial if the defendant decided to put them on the stand. The prosecution could choose which medium to use, and it

[9] The United States suggests that the prosecution could call a witness to the stand, ask nothing, read the statement, and turn the witness over for cross. Petitioners believe the prosecutor would have to ask *something*, if only to determine that the witness had no recollection. In any event, the key is that the prosecution would still call the witness to the stand, and would suffer adverse consequences if the direct testimony were empty. *See California v. Green*, 399 U.S. 149, 159 (1970) (emphasizing benefit to defendant of inconsistency between prior statement and direct testimony).

could craft and rehearse the witness's testimony behind closed doors.

What possible reason is there to believe this would not happen? "Well-established hearsay rules" would prevent this result, assures the United States. Brief at 28. Or, put another way, trust the foxes to guard the chicken coop: Though states allowed Sylvia Crawford to testify without confrontation by talking to a police officer in the station-house, and Amy Hammon to do the same in her living room, states apparently would not take advantage of the leeway accorded them by approval of the defunct Virginia system. But in fact several states already have adopted similar procedures for certain child witnesses. The courts have usually held that these statutes violate the Confrontation Clause, on grounds similar to those argued here by petitioners.[10] A green light from this Court would revive such statutes and

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[10] *State v. Snowden*, 867 A.2d 314 (Md. 2005); *Schaal v. Gammon*, 233 F.3d 1103, 1106-07 (8th Cir. 2000) (Missouri statute; videotaped statements of child victims of statutorily defined offenses; "the State never called the child to testify on direct examination and [defendant] . . . cannot be expected to bear the burden of taking affirmative action to make the State's use of the videotape constitutional"); *Lowery v. Collins*, 996 F.2d 770, 771-72 (5th Cir. 1993) (Texas statute, child witness testifying to certain crimes: "the Sixth Amendment is complied with when the *prosecution* calls the witness first. . . ."); *State v. Apilando*, 900 P.2d 135 (Haw. 1995) (videotaped statements of a child victim of sexual assault: "Simply producing the declarant, without having him or her testify on *direct* examination," violated confrontation right).

allow the states to adopt the same procedure for any category of witness they choose – or, if they prefer, for all witnesses. Statutes passed before and even after *Crawford*, designed to facilitate admission of broad prescribed categories of testimonial accusations, indicate that the states would not be reticent.[11]

As shown in petitioners' principal brief, pp. 18-24, and in the PDS-NACDL *amicus* brief, pp. 14-19, the former Virginia procedure severely impairs the right of the accused to examine a prosecution witness – among other ways by forcing the accused to choose between that right and the "constitutional right not to put on a defense," *Virginia v. Black*, 538 U.S. 343, 365 (2003), an integral aspect of the presumption of innocence, *Taylor v. Kentucky*, 436 U.S. 478, 484 n.12 (1978). *See, e.g., State v. Belvin*, 986 So.2d 516 (Fl. 2008); *State v. Snowden*, 867 A.2d 314 (Md. 2005); *Lowery v. Collins*, 988 F.2d 1364, 1369-70 (5th Cir. 1993) ("Catch-22").[12] Indeed, petitioners believe it is not accurate to describe the opportunity as being one

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[11] *See* Cal. Evid. Code §§ 1370 (statements describing injury to declarant), 1380 (elder or disabled witness); Or. Rev. Stat. § 40.460(18)(b) (witness who was "chronologically or mentally under 12 years of age when the statement was made or was 65 years of age or older when the statement was made"); 725 Ill. Comp. Stat. § 5/115-10.3 (elder witness); Del. Code § 3516 (infirm adults and residents or patients of state facilities); Mich. Comp. L. Ann. § 768.27c (statements alleging domestic violence).

[12] No jury instruction could solve the problem, because it could not alter the reality of the situation. *See Bruton v. United States*, 391 U.S. 123, 137 (1968) (instruction inadequate to relieve "substantial threat" to confrontation right).

for *cross*-examination.[13] But, however the procedure may be characterized, clearly defendants have a right to an *adequate* opportunity for cross-examination, *e.g.*, *Crawford*, 541 U.S. at 57; *Pointer v. Texas*, 380 U.S. 400, 407 (1965), not one that has been designed to "cut down" the right "by making its assertion costly," *e.g.*, *Griffin v. California*, 380 U.S. 609, 614 (1965).

And the prospect of impairing that opportunity – so that it will be exercised less frequently or less effectively or both – is the only reason to choose a scheme like the one involved here. As we have also shown in our principal brief, a state's legitimate interests are fully satisfied by a simple notice-and-demand statute, which is clearly constitutional.[14] Indeed, the *only* difference between such a statute and the system for which Virginia and the United States advocate lies in who puts the witness on the stand;[15] in both systems, if the defense demands

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[13] And the statute does not so describe it. *See* former Code § 192-187.1 ("right to call the person . . . and examine him in the same manner as if he had been called as an adverse witness"). *See also State v. Apilando*, 900 P.2d 135, 145 (Haw. 1995) (describing opportunity under similar procedure as "not cross-examination at all").

[14] *State v. Birchfield*, 157 P.3d 216, 220 (Or. 2007) ("The legislature may require the defendant to assert that right or to design a procedure to determine whether the defendant agrees that a written report will suffice. But, to require that a defendant do more changes the right to insist that the state present evidence the 'old-fashioned way' into an obligation to procure a witness for the state.").

[15] They concede that a system placing the burden of witness no-shows on the defense is invalid.

the presence of the technician, the prosecution must secure it or forgo use of the certificate. Then what possible legitimate goal does a state have in insisting that the defendant call the witness to the stand?

The United States, recognizing the problem, asserts that this procedure reduces the risk of gamesmanship, in which the defendant will insist on the presence of the technician even if he has no interest in cross-examining him, simply to impose a burden on the prosecution. Brief at 31. But the argument collapses on mere examination.

First, *if* this were a problem, insisting that it be the defendant who presents the testimony of the witness would not solve it; the defendant could say that, although he had anticipated putting the technician on the stand he no longer believes it advantageous to do so.

Second, *if* it were a problem, there would be less restrictive alternatives, such as requiring that the defense assert that it "intends in good faith" to cross-examine.[16] Petitioners take no position on the constitutionality of such a requirement, a question not presented here; they only assert that such a requirement, tacked on to a genuine notice-and-demand statute, would impair the confrontation right far less

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[16] Such a requirement has been incorporated in some statutes. *E.g.*, Ala. Code 1975 § 12-21-32(b); La. Rev. Stat. Ann. § 15:501(B)(2); Alaska Stat. § 12.45.084 ("written demand showing cause").

than does the procedure involved here, and provide a genuine solution to the purported problem.

Third, the Government offers no data at all suggesting that this practice is pervasive, and data we have offered, indicating that defendants almost always cross-examine even when the witness testifies at the prosecutor's initiative, Brief at 33-34 n.13, suggest that it is not.

Finally, even if the problem were pervasive, it would not be serious. The leverage accorded the defendant would be far less than, say, that resulting from the defendant's right to impose the costs of a jury trial on the state; and the state, as the classic repeat player, has ample incentives and ample resources to ensure that the defense gains no significant advantage from such a tactic, or that it backfires. *See, e.g., Bordenkircher v. Hayes*, 434 U.S. 357 (1978).[17]

In short, not only does the backwards procedure here violate *Melendez-Diaz*, but it runs contrary to hundreds of years of practice deeply engrained in the fabric of common law trials; it impairs the right of an accused to examine a prosecution witness; and it serves no valid purpose that could not be better achieved by less restrictive means.

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[17] Note that petitioner Cypress feared prosecutorial reprisal if he asserted his confrontation rights before trial. JA 110.

B. The former Virginia statutory scheme is fatally defective in that it requires the defendant who wishes to examine a prosecution witness, rather than the prosecution, to bear the risk that the witness will not appear at trial.

As explained above in Section A, the statutory language provides clearly that, so long as the prosecution complies with the statute's requirements, the certificate is unconditionally admitted, and *then* the accused may call the analyst as a witness. There is no suggestion whatsoever that if the analyst is unavailable or refuses to appear the certificate must be struck.[18] Accordingly, the defense bears the risk that the witness will be unavailable. And the Virginia courts have never indicated otherwise.

In the decision under review, *Magruder v. Commonwealth*, the Supreme Court of Virginia asserted that rather than subpoenaing the analyst himself the accused may ask the Commonwealth or the court to do so. But the difference between a subpoena and such a request is inconsequential; in either event, the accused must file a demand and in either case state agents rather than the defendant himself would

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[18] If the scheme placed on the prosecution the risk that the witness would be unavailable, one would expect that it would include a time by which the defendant must make the demand or lose his rights. Virginia, recognizing the problem, now tries to read into the scheme an unstated standard of reasonableness, and asserts that petitioners' objection failed to meet it. Brief at 16 n.5.

attempt to secure the presence of a witness who is recalcitrant or difficult to find. Indeed, at the time these cases were tried, defendants did not have the power to issue subpoenas directly to *any* witness; they gained that power by a 2007 amendment to Code § 19.2-267. Before then, though lawyers and courts sometimes referred informally to defense subpoenas, the rule was that "a defendant's witnesses . . . generally must be subpoenaed on request through the clerk's office." *Maldonado v. Commonwealth*, 2006 WL 3798583 (Va. Ct. App. 2006). In other words, the procedure to which *Magruder* refers is essentially the same procedure that was applicable to *any* defense witness; this is Virginia's means of complying with the Compulsory Process Clause. And of course it is the defense, not the prosecution, that bears the risk that defense witnesses do not appear to testify. *Magruder* did not alter this underlying rule. It contained no hint that if, notwithstanding good faith efforts by the Commonwealth, the technician does not appear, then the certificate, having already been admitted, must be struck.

Thus, Virginia relies heavily on *Grant v. Commonwealth*, 682 S.E.2d 84 (Va. Ct. App. 2009). For several reasons, the reliance is completely unavailing.

1. *Grant simply did not present the issue of who bears the risk of the witness being unavailable or unwilling to testify, and nothing in it suggests an answer to that question.* Grant filed a notice demanding that the technician testify – but Virginia did

absolutely nothing to try to procure the attendance of the witness.

2. *The history of Grant itself indicates that Virginia law treated the risk of the witness being unavailable as on the defendant.* The trial court held that Grant's notice was ineffective; Grant had to subpoena the witness himself. On appeal, Virginia insisted vigorously that this ruling was correct, Brief in Opposition to Petition for Appeal, July 17, 2008, at 2 ("*The Plain Meaning of the Language Used in Virginia Code § 19.2-187.1 Clearly Places on the Defendant the Duty to Subpoena Those Who Perform Any Analyses or Whose Attestations Appear on a Certificate of Analysis Offered Into Evidence by the Commonwealth.*"); Brief for the Commonwealth, October 17, 2008, at 23 ("Grant *failed to vindicate* his right to confront the breath test operator through his failure to subpoena her for trial."); it characterized as dictum the *Magruder* court's assertion that the accused could satisfy the statute by asking the Commonwealth to produce the declarant. Oral Argument, May 7, 2009, at 19:05-20:23, available at <http://www-personal.umich.edu/~rdfrdman/GrantvCW.MPG>.

3. *Grant was uncontested on the merits.* After this Court decided *Melendez-Diaz* and granted *certiorari* in this case, Virginia promptly reversed position. Nothing further had happened to change the meaning of the statutory scheme – but that scheme was obviously invalid, soon to be replaced, and so Virginia's only interest was in preserving the convictions in this case and any others in the pipeline. Hence, it

now took a view of the statute diametrically opposed to the one on which it had insisted just weeks before. Therefore, it no longer denied Grant's contention that it had violated the statute by failing to attempt to produce the technician.

4. *Even if it had decided the issue, and in a contested case, Grant, as a lower court decision, would not be binding on this Court. Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

Grant, in short, provides no support at all for the Commonwealth's newly discovered reading of the statute. The most one could draw from *Grant* is confirmation of the Virginia Supreme Court's suggestion in *Magruder* that if the defendant asks the prosecution to ensure the technician's availability as a trial witness then the prosecution must attempt to do so; it cannot simply ignore the request. Nothing in *Grant* suggests that the statute provides that the prosecution bears the risk that, notwithstanding reasonable efforts, the technician will prove to be unavailable to testify. The Court should construe the statute in accordance with its plain meaning. In no event can it take as established the proposition that the former Virginia statute placed on the prosecution the burden of witness-no shows.

II. THE DEFENDANTS DID NOT WAIVE THEIR CONSTITUTIONAL RIGHTS BY DECLINING TO INVOKE VIRGINIA'S INVALID STATUTORY PROCEDURE.

Virginia relies heavily on its argument that petitioners waived their confrontation claim. The argument is basically a repeat of one Virginia made in its failed attempt to oppose a grant of *certiorari*. The argument has no more merit now than it did then. Several points warrant emphasis.

1. Petitioners objected at trial on Confrontation Clause grounds to introduction of the lab certificates. JA 32 (Briscoe), 106 (Cypress). Virginia offers no reason to conclude that, had it chosen to, it could not have presented the lab technicians as live witnesses; these were bench trials, and so far as appears, the inconvenience would have been minimal. Instead, it chose to fight. It did not then claim waiver, but rather contended, and the respective trial courts held, that it had no obligation to present the technicians as live witnesses because the reports were not testimonial. JA 32-51 (Briscoe), 107-14 (Cypress).

2. The Virginia Supreme Court ultimately held in this case that the then-prevailing procedure did not violate the Confrontation Clause. JA 204, 211. Given that the Virginia Court reached the issue, there is no reason why this Court should not.

3. The only possible basis for a waiver claim is the contention that petitioners did not comply with the provisions of former § 19.2-187.1. Unlike the new

statute, this one provided notice to defendant only if he had thought ahead to ask for it. Moreover, it provided no deadline for the defendant to cause the witness to be summoned, and petitioners stated their objection before the certificates were introduced. Virginia's attempt to interpolate a vague "reasonableness" standard into the statute cannot vest it with the clarity necessary for a statute providing for waiver of a constitutional right. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

4. In any event, the contention adds nothing to the arguments already made by Virginia. An accused cannot be held to have waived a constitutional right by declining to invoke a procedure that fails to protect that right. The majority, as well as the dissent, in the Virginia Supreme Court recognized this point. *See* JA 192 (majority: "The dispositive issue . . . is whether the [former statutory] procedure . . . adequately protects a criminal defendant's rights under the Confrontation Clause . . . , *and if so*, whether [defendants] . . . waived their Confrontation Clause challenges . . . " (emphasis added)), 231-32 (three dissenters: A defendant's choice "not to exercise this statutory right is insufficient to establish a waiver of his separate constitutional confrontation right. . . . The extent of a defendant's waiver of a right under Code § 19.2-187.1 necessarily is limited to rights he possesses under the statute.") And of course the essence of the petitioners' contention in this Court is precisely that the statutory scheme fails to protect the confrontation right.

5. Failure to follow a procedure that clearly preserves a defendant's confrontation rights *can* result in waiving those rights. Prospectively, a state may create such a procedure, as Virginia now has done. But a state cannot by retroactive alterations, or by unpredictable reconstructions of the law, ordain that its procedure complied with the confrontation right, so that the accused should have invoked it. *See, e.g., Reich v. Collins*, 513 U.S. 106, 110-11 (1994); *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964); *Wright v. Georgia*, 373 U.S. 284, 291 (1963) ("Novelty in procedural requirements cannot be permitted to thwart review in this Court * * * ," *quoting N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457 (1958)).

(a) *In this case*, the Virginia Supreme Court declared clearly that the statutory scheme provided for the defendant to call the technician as witnesses. *See* JA 200 ("At trial, the defendants could have called the forensic analysts as witnesses, placed them under oath, and questioned them . . . "). Petitioners should not be expected to have anticipated that perhaps the statute would be applied in any other way in their cases.

(b) Nor should petitioners be expected to have anticipated that the defunct statutory scheme would be construed to impose on the prosecution the risk that the technician would be unavailable despite good faith efforts to procure her testimony. No court has ever held that the statute has that effect. Indeed, as explained above, until after this Court granted *certiorari* in this case, Virginia contended that if the

defendant wished to examine the witness he had to subpoena the technician (or more precisely, request the court to do so), and this is how the statute was understood at the time of petitioners' trials.

Petitioners believe that the statute is clear, and that its requirements violate the Confrontation Clause in these two respects. At best – in Virginia's own view – it is ambiguous. Brief at 15. Failure to invoke it cannot provide a basis for waiver.

6. Virginia speculates that *perhaps*, if petitioners had ensured the presence of the technicians (assuming, implicitly, that their presence could be secured), the respective prosecutors would have put the technicians on the witness stand. But Virginia offers no reason at all to suppose that, had the petitioners done what the defendant did in *Grant*, filed a notice demanding that the prosecution produce the witness, the prosecutors would have done anything different from what the prosecution did in *Grant* – which was precisely nothing, apart from arguing that the defendant had to subpoena the witness.[19] Virginia vigorously argued in these cases that it had no obligation at all to produce the technicians as live witnesses, whose statements it incorrectly believed

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[19] Petitioners' understanding is that in the jurisdictions where Briscoe and Grant were tried, this was the Commonwealth's standard practice before *Melendez-Diaz*, and at the time and place of Cypress's trial, defendants rarely if ever issued such notices.

were non-testimonial; it would not have produced them had it been asked earlier.

Faced with a statutory system that does not protect his rights, the accused should not bear the burden of anticipating or devising a procedural system that does. It was always in the power of Virginia to create such a system – and it has since done so. That system removes any need for speculation: If the accused makes a demand for confrontation by a designated time, his rights are fully honored, and if he fails to do so then he waives those rights.

III. PROTECTING DEFENDANTS' CONFRONTATION RIGHTS DOES NOT IMPOSE AN UNDUE BURDEN ON THE STATES.

In states that, like Virginia, previously did not accord defendants the right recognized by *Melendez-Diaz*, the necessity to do so inevitably creates *some* additional cost. The state *amici* continue to complain about the burden. But see Brief of United States at 31 ("simple notice-and-demand statutes can mitigate some of the burden on the States"). There is, of course nothing new in this type of argument, *see* ANTHONY LEWIS, GIDEON'S TRUMPET 161, 167 (1964) (states complaining of "unbearably onerous financial burden," "enormous burden on members of the bar," and "unnecessary expense to taxpayers" that would follow from rule requiring appointment of counsel), and it is constitutionally irrelevant. *See, e.g., Melendez-Diaz*, 129 S.Ct. at 2540; *Bruton v. United States*, 391 U.S.

123, 135 (1968). In any event, the states provide no significant supporting data – and in fact sufficient data and experience are already available to demonstrate that the burden is a modest one, easily borne. Consider the following, in addition to the data on Michigan provided in petitioners' principal brief:

District of Columbia – As the United States suggests, Brief at 31-32, the District provides a particularly useful example, because the decision in *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), *cert. denied*, 552 U.S. 895 (2007), effectively anticipated *Melendez-Diaz* and *prospectively* transformed the District's system from one like Virginia's former one to a simple notice-and-demand statute. The Government cites a letter (solicited by the Government) by the director of the relevant laboratory to the effect that, since *Thomas*, subpoenas have risen substantially and the lab has had to pay overtime expenses. The Government fails to mention, however, that the letter indicates that, as compared to the pre-*Thomas* period, the lab now spends a little more than 1,000 additional hours per year – or about one-half a person-year – responding to subpoenas in the District's local courts. And, though the letter asserts that the number of lab analysts has fluctuated between 18 and 23 since 2006, it fails to explain the true significance of this fact: The director has since reported (in response to an inquiry by petitioners) that the lab

had 23 analysts in 2006 and 18 now.[20] In other words, the District is now being served with considerably *fewer* analysts than before *Thomas*.

Ohio – For three decades, Ohio has had, for drug analyses, a simple notice-and-demand statute that complies with *Melendez-Diaz*; if the state wishes to prove the results of other types of lab tests, it must, absent a stipulation, put an analyst on the witness stand. According to the state,[21] its Bureau of Criminal Identification and Investigation has 14 assigned forensic scientists. In 2008, they made 123 appearances in drug cases, resulting in 626.25 hours away from the lab – in other words, on average *each forensic scientist made less than one appearance per month in court*, for an average of about five hours away from the lab per appearance. Through mid-November 2009, the forensic scientists have made 87 appearances in drug cases and spent 393.75 hours away from the lab, both *pro rata* reductions from the 2008 figures. In 2008, BCI&I worked 12,585 drug cases, meaning that a forensic scientist testified at trial in *fewer than 1%* – and this includes cases (presumably most of the total) in which the prosecution rather than the defense sought the live testimony.

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[20] Letter from James V. Malone to Kathleen A. Felton, Nov. 18, 2009, available at <http://www-personal.umich.edu/~rdfrdman/Maloneltr.pdf>.

[21] E-mail from Benjamin Mizer, Solicitor General of Ohio, to Richard D. Friedman, December 4, 2009, available at <http://www-personal.umich.edu/~rdfrdman/Mizer.pdf>.

Massachusetts – The states report that the average turnaround for drug analysis in Massachusetts, the state of *Melendez-Diaz* itself, more than doubled to 169 days between July 2008 and July 2009. Brief at 7-8. It would not be productive to dwell on the mystery of how *Melendez-Diaz*, decided on June 25, 2009, could possibly have accounted for any substantial part of that change. Consider instead this public statement by a leading Massachusetts prosecutor at a recent conference considering the impact of the decision:

> Many of you may expect me to get up here today and say, "The sky is falling, this is horrible, this is horrible, we cannot do justice." Well, I'm here to say quite the opposite. . . . [B]ased upon the efforts that have been made since the *Melendez-Diaz* decision, I can say that I think it's going to work out, and I think especially . . . when it comes to drug cases, I'm quite confident that our state and hopefully all states in the country are going to be able to deal with *Melendez-Diaz* in an efficient, appropriate and just way, to hold those accountable but also to afford the constitutional rights to all defendants.[22]

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[22] Remarks of Patrick M. Haggan, Chief Trial Counsel, Suffolk County District Attorney's Office, *Confronting Forensic Evidence: Implications of* Melendez-Diaz v. Massachusetts *and* Briscoe v. Virginia Cite, Symposium at New England School of Law, Nov. 13, 2009, available at <http://www.nesl.edu/students/nc_

(Continued on following page)

Virginia – The figures cited in the States' *amicus* brief are in error. Updated figures supplied by the Commonwealth show that in the 18 months before *Melendez-Diaz*, the number of subpoenas received by the Department of Forensic Services ranged as high as 261. Immediately after the decision, apparently as a result of prosecutorial over-reaction, the number spiked to 1,164, but it has fallen every month since; the number for October was 788. Virginia Department of Forensic Service, *Drug Subpoena Data*, available at <http://www-personal.umich.edu/~rdfrdman/Subpoenas.pdf>. Again, many of these are at the initiation of prosecutors, and of course the number of subpoenas is vastly greater than the number of court appearances. It is likely that (as occurred in the District of Columbia) further adjustments to the new system will occur, and that ultimately the results will be similar to those of Ohio.

IV. THE COURT SHOULD DECIDE THIS CASE ON THE MERITS – BUT IF IT DECIDES NOT TO, IT SHOULD VACATE AND REMAND FOR RECONSIDERATION IN LIGHT OF *MELENDEZ-DIAZ*.

The Commonwealth's suggestion that the Court dismiss the writ of certiorari as improvidently granted falls well wide of the mark. The petition in this case,

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seeking direct review of the Virginia decision, was pending when *Melendez-Diaz* was decided. That decision, at the very least, dramatically altered the landscape against which the Virginia Supreme Court made its decision. It would have been "extraordinarily inequitable" to let that court's decision stand, without any court ever having heard petitioners' cases under the proper legal standard. Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – And an Alternative*, 107 MICH. L. REV. 711, 737-38 (2009). The proper course then, if the Court did not wish to review this case, would therefore have been to grant the petition, vacate the decision below, and remand for reconsideration (GVR) in light of *Melendez-Diaz*, *see Lawrence v. Chater*, 516 U.S. 163, 167 (1996) ("reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation,"), *id.* at 191-92 (Scalia, J., dissenting) ("where an intervening factor has arisen that has a legal bearing upon the decision"); EUGENE GRESSMAN, et al., SUPREME COURT PRACTICE 345-49 (9th ed. 2007) – as it has done in several cases both on the very day the Court granted the petition in this case and since then. *E.g.*, *Barba v. California*, 129 S.Ct. 2857 (2009); *Norwood v. United States*, 2009 WL 2134356 (U.S. Nov. 2, 2009). Denial of the petition would have been inappropriate after *Melendez-Diaz*; dismissal of the petition, meaning that no court would ever have the opportunity to determine the impact of that case on

this one, would be no more appropriate now. If the Court now decides in light of subsequent developments that it does not wish to give plenary review to this case, the proper course remains to vacate the decision of the Virginia Supreme Court and remand the case to that court with no instruction other than to reconsider in light of *Melendez-Diaz*.

Nevertheless, the far preferable course is to decide the case on the merits and rule that admission of the laboratory certificates was error. Virginia and its supporting *amici* contend that the former Virginia statute and statutes like it, *see, e.g.*, Idaho Code § 37-2745; N.D. Cent. Code § 19-03.1-37, are constitutional though they do not require the prosecution to provide live witnesses; it would be far better for the Court to make clear that this is not so, and it can do so without resolving any disputes over the meaning of state law. It would also be highly beneficial for the Court to remove any lingering doubt that genuine, simple notice-and-demand statutes *are* constitutional. And, for several reasons, the best course is not to remand in search of a definitive resolution of the meaning of the former Virginia law: (1) No remand is necessary to determine that the statutory scheme at issue here did not require the prosecution to call live witnesses, and that in itself renders the scheme unconstitutional. (2) The scheme is now defunct, covering no cases other than the present ones and any similar ones in the pipeline. It is cost-free for the Commonwealth and its courts to ascribe a generous interpretation to the statute now – because the only

consequence of doing so is to cast doubt on defendants' constitutional claims. (3) Any attempt to construe the former scheme as a simple notice-and-demand statute would, for the reasons stated above in Part II, so distort the statutory language that it could not constitutionally be applied to petitioners.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

(15)

No. 07-11191

In the Supreme Court of the United States

MARK A. BRISCOE AND SHELDON A. CYPRESS,
PETITIONERS

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a state statute that authorizes the prosecution to introduce a certificate of a forensic laboratory analysis without presenting the live testimony of the analyst who prepared the certificate, on condition that the prosecution produce the analyst and permit the defendant to call the analyst for cross-examination on the defendant's timely request, complies with the Confrontation Clause of the Sixth Amendment.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
The right to cross-examine forensic analysts whose certificates are admitted at trial satisfies the Confrontation Clause 10
A. The Confrontation Clause entitles criminal defendants to cross-examine the witnesses against them 11
B. The Confrontation Clause does not dictate the order of proof at trial 15
1. The Sixth Amendment's text does not mandate a particular order of proof 17
2. History furnishes no basis for reading the Confrontation Clause to require a particular order of proof at trial 19
3. Tactical considerations do not justify expanding the Confrontation Clause right to include the order of proof at trial 21
C. States should have latitude to design notice-and-demand rules to reduce gamesmanship while protecting genuine interests in cross-examination 29
Conclusion 34
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Boykin v. *Alabama*, 395 U.S. 238 (1969) 18

Cases—continued: Page

Brooks v. *Commonwealth*, 638 S.E.2d 131 (Va. Ct. App. 2006) 4, 16
California v. *Green*, 399 U.S. 149 (1970) 8, 12, 24, 25
Carter v. *Kentucky*, 450 U.S. 288 (1981) 26
Coy v. *Iowa*, 487 U.S. 1012 (1987) 12
Crawford v. *Washington*, 541 U.S. 36 (2004) ..... *passim*
Davis v. *Alaska*, 415 U.S. 308 (1973) 22
Delaware v. *Fensterer*, 474 U.S. 15 (1985) 22, 29
Delaware v. *Van Arsdall*, 475 U.S. 673 (1986) 22
Florida v. *Nixon*, 543 U.S. 175 (2004) 17
Geders v. *United States*, 425 U.S. 80 (1976) 22
Gilbert v. *California*, 388 U.S. 263 (1967) 24
Goldsby v. *United States*, 160 U.S. 70 (1895) 23
Grant v. *Commonwealth*, 682 S.E.2d 84 (Va. Ct. App. 2009) 2
Huddleston v. *United States*, 485 U.S. 681 (1988) 22
Lowery v. *Collins*, 988 F.2d 1364 (5th Cir. 1993) 26
Luce v. *United States*, 469 U.S. 38 (1984) 16
Maryland v. *Craig*, 497 U.S. 836 (1990) 6, 12, 18, 29
Melendez-Diaz v. *Massachusetts*, 129 S. Ct. 2527 (2009) ..... *passim*
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 22
Raleigh's Case, 2 How. St. Tr. 1 (1603) 19, 20
Richardson v. *Marsh*, 481 U.S. 200 (1987) 27
Smith v. *Illinois*, 390 U.S. 129 (1968) 22
Taylor v. *Illinois*, 484 U.S. 400 (1988) 19
Thomas v. *United States*, 914 A.2d 1 (D.C. 2006), cert. denied, 128 S. Ct. 241 (2007) 2, 31

Cases—continued: Page

United States v. *Butterworth*, 511 F.3d 71 (1st Cir. 2007), cert. denied, 129 S. Ct. 37 (2008) 25
United States v. *Faul*, 748 F.2d 1204 (8th Cir. 1984), cert. denied, 472 U.S. 1072 (1985) 23
United States v. *Jones*, 438 F.2d 1199 (6th Cir.), cert. denied, 404 U.S. 913 (1971) 23
United States v. *Newton*, 326 F.3d 253 (1st Cir. 2003) ... 23
United States v. *Owens*, 484 U.S. 554 (1988) 11, 22, 24, 26
United States v. *Tran*, 568 F.3d 1156 (9th Cir. 2009) 25

Constitution, statutes and rules:

U.S. Const. Amend. VI ..... *passim*
Compulsory Process Clause 13, 14, 18
Confrontation Clause ..... *passim*
Del. Const. of 1792, Art. I, § 7 17
Ky. Const. of 1792, Art. XII, § 10 17
Mass. Const. Pt. 1, Art. 12 17
N.H. Const. Pt. 1, Art. XV 17
N.C. Const. of 1776, Declaration of Rights § 7 17
Pa. Const. of 1776, Declaration of Rights § 9 17
Tenn. Const. of 1796, Art. XI, § 9 17
Va. Code Ann.:
§ 18.2-248 (2004) 3
§ 18.2-248(C) (2004) 3, 5
§ 18.2-248.01 (2004) 3
§ 18.2-256 (2004) 3

Statutes and rules—Continued: Page

§ 19.2-187:
(Supp. 2005) 2, 13, 28, 1a
(Adv. Code Serv. 2010) 2, 3a
§ 19.2-187.1 (2000) ..... *passim*
Fed. R. Evid.:
Rule 611(a) 23
Rule 801(d)(1) 24

Miscellaneous:

9 W.S. Holdsworth, *A History of English Law* (1st ed. 1926) 20
Randolph N. Jonakait, *The Orgins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77 (1995) 21
John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1 (1983) 20
3 *Legal Papers of John Adams* (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) 21
1 David Robertson, *Reports of the Trials of Colonel Aaron Burr for Treason* (1808) 21
1 James Fitzjames Stephen, *A History of the Criminal Law of England* (1883) 19
28 Charles Alan Wright & Victor Alan Gold, *Federal Practice and Procedure* (1993) 23

In the Supreme Court of the United States

No. 07-11191

MARK A. BRISCOE AND SHELDON A. CYPRESS,
PETITIONERS

v.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether a state statute that authorizes the prosecution to introduce a certificate of a forensic laboratory analysis without presenting the live testimony of the analyst who prepared the certificate, on condition that the State produce the analyst and permit the defendant to call the analyst for cross-examination on the defendant's timely request, complies with the Confrontation Clause of the Sixth Amendment. The federal government brings prosecutions in the District of Columbia, which has a statute similar to the Virginia statute at issue here. In an effort to avoid constitutional difficulties, the District's highest court has interpreted that statute to require that the prosecution question the analyst during its case-in-chief

if the defendant so demands. *Thomas* v. *United States*, 914 A.2d 1, 19-20 (D.C. 2006), cert. denied, 128 S. Ct. 241 (2007). The question presented also has implications for the conduct of federal criminal trials. The United States therefore has a significant interest in this case.

STATEMENT

1. At the time of petitioners' trials, Virginia law provided that, in any criminal trial, a certificate of forensic analysis prepared in certain state and federal laboratories was "admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein," provided that the certificate was "duly attested" and "filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial." Va. Code Ann. § 19.2-187 (Supp. 2005). Virginia law also provided defendants with "the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness," with such witness to be "summoned and appear at the cost of the Commonwealth." *Id.* § 19.2-187.1 (2000). The Commonwealth accepts that "[i]f the prosecutor fails to produce the analyst at trial based on such a demand, * * * the certificate of analysis is inadmissible." Resp. Br. 9, 16-18 (citing *Grant* v. *Commonwealth*, 682 S.E.2d 84, 89 (Va. Ct. App. 2009)).[1]

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[1] Effective August 21, 2009, following this Court's decision in *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), the Virginia legislature substantially amended the provisions here at issue to bring them in line with the "simplest form [of] notice-and-demand statutes" discussed in *Melendez-Diaz*, *id.* at 2541. See Va. Code Ann. § 19.2-187 (Adv. Code Serv. 2010). This brief refers to the pre-amendment provisions in effect at the time of petitioners' trials. Both versions are reproduced in an appendix, *infra*.

2. a. On February 10, 2005, police officers executed a search warrant at the apartment of petitioner Mark A. Briscoe. In the kitchen they found "off-white chunky solid material," scales, a razor blade, sandwich bags, and a plate. J.A. 4, 77, 189. Another "white, rock-like substance" was found in the pocket of Briscoe's shorts. *Ibid.* Briscoe told the officers that everything they had found in the search "is mine, the coke, the crack, the baggies. It was all mine." J.A. 78. Briscoe further told the officers that the rock in the sink should have weighed "around 40 grams," that he had gotten it "from my man in D.C. two weeks ago," and that there were three main people in Washington "that I get coke from." *Ibid.*

Briscoe was charged with possession with intent to distribute cocaine in violation of Va. Code § 18.2-248(C), transporting cocaine into the Commonwealth with intent to distribute, in violation of Va. Code § 18.2-248.01, and conspiring to distribute cocaine, in violation of Va. Code §§ 18.2-248 and 18.2-256.

b. On May 24, 2005, more than three weeks before Briscoe's trial began, the Commonwealth filed two certificates of analysis. J.A. 4-5, 6-7. The certificates attested that the substance found in Briscoe's pocket contained 2.573 grams of cocaine and that the items found in Briscoe's kitchen contained a total of 34.005 grams of cocaine. Both certificates were signed by Jeana J. Rodenas, a forensic scientist employed by the Division of Forensic Science of the Virginia Department of Criminal Justice Services. *Ibid.* Briscoe did not seek to have Rodenas summoned as a witness pursuant to Section 19-2.187.1.

At trial, when the government sought to admit the certificates into evidence, Briscoe's counsel objected

that, "without [the forensic scientist] here as a witness testifying, if these documents were to be admitted, it would be in violation of Mr. Briscoe's confrontation rights under the Sixth Amendment." J.A. 32. The court overruled the objection, explaining that "our statute provides that the defense shall have a right to call the witness or the preparer of the certificate and call that person as an adverse witness at the expense of the Commonwealth," J.A. 49, and that "the fact that the Defendant has the right to call the preparer of the certificate as an adverse witness protects the Defendant's rights," J.A. 51.

Briscoe did not present any evidence. J.A. 50-51, 190-191. He was convicted of possession with intent to distribute and transportation of cocaine into the Commonwealth. J.A. 69. He was sentenced to 20 years of imprisonment, with all but 68 months suspended. J.A. 73.

c. The Virginia Court of Appeals affirmed. J.A. 75-81. The court rejected Briscoe's Confrontation Clause objection to the admission of the certificates of analysis, citing *Brooks* v. *Commonwealth*, 638 S.E.2d 131 (Va. Ct. App. 2006). J.A. 76-77. In *Brooks*, the Virginia Court of Appeals had assumed certificates of analysis to be testimonial evidence under *Crawford* v. *Washington*, 541 U.S. 36 (2004), and therefore subject to confrontation under the Sixth Amendment. *Brooks*, 638 S.E.2d at 134. The court found, however, that Section 19.2-187.1 set out "a reasonable procedure to be followed in order for a defendant to exercise his right to confront a particular limited class of scientific witnesses at trial and that a defendant's failure to follow this procedure amounts to a waiver of the constitutional right to confront such witnesses." *Id.* at 136. The court of appeals in Briscoe's

case concluded that, consistent with *Brooks*, Briscoe's failure to invoke his right to confront the analyst under Section 19-2.187.1 constituted a waiver of any Confrontation Clause objections to the admission of the certificates of analysis. J.A. 77.

3. a. On June 25, 2005, a Virginia State Police trooper stopped a car for having improperly tinted windows. J.A. 93-94, 186. Petitioner Sheldon A. Cypress was the sole passenger in the car, and his cousin, Melvin Bailey, was the driver. J.A. 93-94, 126, 186. Bailey consented to a search of the car, which turned up two plastic bags, each containing a "chunky white substance." J.A. 186. Cypress later told Bailey that the drugs were his and that he had placed them under the seat. J.A. 127-128.

Cypress was charged with possession with intent to distribute cocaine in violation of Va. Code § 18.2-248(C). J.A. 88-89.

b. On November 28, 2005, more than four months before Cypress's trial began, the government filed a certificate of analysis prepared by Nicole M. Anderson, a forensic scientist employed by the Virginia Department of Forensic Science, attesting that the two plastic bags found in Bailey's car contained a total of 60.5 grams of cocaine hydrochloride. J.A. 84-87. Cypress did not seek to have Anderson summoned as a witness pursuant to Section 19-2.187.1.

At trial, when the government sought to admit the certificates into evidence, Cypress's counsel objected that admission of the certificate without Anderson present violated Cypress's confrontation rights. J.A. 109. When asked why he had not raised the objection earlier, Cypress's counsel replied that he "wanted my client in jeopardy when I raised this issue," and that requiring

him to raise the issue before trial would violate the Confrontation Clause. J.A. 110-111. The court overruled the objection on the ground that the certificate of analysis was not a testimonial statement. J.A. 112.

The court found Cypress guilty as charged. J.A. 170. Cypress was sentenced to 15 years of imprisonment, with all but five years suspended. J.A. 173.

c. The Virginia Court of Appeals affirmed. J.A. 176-180. Relying on *Brooks*, the court concluded that Cypress' failure to request that Anderson be summoned as a witness constituted a waiver of his constitutional right of confrontation. J.A. 177-178.

4. The Virginia Supreme Court consolidated the cases and affirmed. J.A. 182-233. The court assumed, *arguendo*, that the certificates of analysis were testimonial statements subject to confrontation under *Crawford*. J.A. 194. The court concluded, however, that "the procedure provided in Code § 19.2-187.1 adequately protects a criminal defendant's rights under the Confrontation Clause," and petitioners' failure to invoke their statutory right to have the analysts summoned waived their challenge to the admissibility of the certificates of analysis. J.A. 183.

The court reasoned that Section 19.2-187.1 "supplies the 'elements of confrontation—physical presence, oath, cross-examination, and observation of demeanor by the trier of fact.'" J.A. 200 (quoting *Maryland* v. *Craig*, 497 U.S. 836, 846 (1990)). It explained that, under Section 19-2.187.1, petitioners could have guaranteed the analysts' presence at trial by asking the Commonwealth or the court to summon them; and petitioners could have then "called the forensic analysts as witnesses, placed them under oath, and questioned them as adverse witnesses," giving the "trier of fact" the "opportunity to

observe the demeanor of the witnesses." *Ibid.* "In short," the court concluded, if petitioners "had utilized the procedure in Code § 19.2-187.1, they would have had the opportunity to cross-examine the forensic analysts." J.A. 200-201.

The court rejected petitioners' challenges to the adequacy of the procedure, including their argument that Section 19.2-187.1 "shifts the burden of producing evidence and requires a criminal defendant to call the forensic analyst in order to exercise his right to confront the witness." J.A. 204. The court explained that, "[b]ecause [petitioners] did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, they were never in the position of being forced, over their objection, to call a forensic analyst as a witness." J.A. 205.

Finally, the court held that "[t]he provisions of Code §§ 19.2-187 and 19.2-187.1 adequately inform a criminal defendant of the consequences of the failure to exercise the right to have a forensic analyst present at trial for cross-examination"—namely, "that a certificate of analysis will be admitted into evidence without testimony from the person who performed the analysis." J.A. 209, 210. The court accordingly ruled that petitioners' failure to invoke their Section 19.2-187.1 rights waived their right to be confronted with the forensic analysts. J.A. 211.

Three justices dissented. J.A. 218-233. In their view, petitioners' Sixth Amendment right "to be confronted with the witnesses against" them was violated because petitioners "were not able to subject the contents of the certificates of analysis to adversarial scrutiny before the prosecution concluded its cases in chief." J.A. 229.

SUMMARY OF ARGUMENT

The Virginia Supreme Court in this case assumed (J.A. 194), as this Court later held in *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), that certificates of forensic analysis are testimonial statements subject to confrontation under the Sixth Amendment. The Virginia Supreme Court then correctly held that admitting the certificates in petitioners' cases did not violate the Confrontation Clause. State law gave petitioners the right to have the analysts summoned at trial, where the analysts would be fully subject to cross-examination. Because that procedure adequately protects the Sixth Amendment confrontation right, the Virginia Supreme Court correctly held that petitioners' failure to invoke the procedure waived their constitutional objection to the admission of the certificates of analysis without the analysts' live appearance at trial.

A. The Confrontation Clause of the Sixth Amendment entitles a criminal defendant to test the government's witnesses through cross-examination. Absent a prior opportunity for cross-examination, the Clause generally prohibits the government from introducing in a criminal trial a witness's out-of-court testimonial statements if the witness does not appear and thus cannot be cross-examined. When, however, the witness "appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford* v. *Washington*, 541 U.S. 36, 60 n.9 (2004) (citing *California* v. *Green*, 399 U.S. 149, 162 (1970)).

The Virginia statutes at issue in this case permit the prosecution to introduce the duly attested results of laboratory forensic analysis at trial, but on the condition that, if the defendant makes a timely request, the ana-

lyst will be produced for cross-examination. Those provisions are notably different from state laws that provide for the admission of certificates of analysis while giving the defendant only the power to subpoena the analyst if he chooses. Respondent acknowledges that defendants have not only a mechanism to hale the analyst into court, but also a right to have the certificate of analysis excluded from evidence if, on timely request, the State fails to produce the witness for cross-examination. So understood, Virginia law preserves criminal defendants' Sixth Amendment right to be confronted with a forensic analyst whose out-of-court testimonial statement is admitted as substantive evidence at trial.

B. The statutory right to cross-examine the forensic analyst meets constitutional requirements even though it does not guarantee that the prosecution will first present the analyst's direct testimony during its case-in-chief. Neither the text of the Confrontation Clause, nor its history, nor the defendant's tactical preference justifies a constitutional rule that would mandate a particular order of proof at trial. A State may have valid reasons for deviating from the traditional order of proof, and it may thus allow cross-examination at some time other than immediately following a direct examination during the prosecution's case-in-chief. Concerns about jury confusion or prejudice can be alleviated through appropriate clarifying instructions.

C. A rule that would require States to guarantee not only the right to cross-examine the analyst, but also the right to insist that the prosecution present the analyst's testimony during its case-in-chief, would have substantial costs. It would leave defendants who have no demonstrable intention of challenging forensic laboratory results free to demand the analyst's appearance simply

to test the government's ability to produce the analyst at trial. States have a legitimate interest in not being forced to pay the needless expense of bringing forensic analysts to court—and in not running the risk of having the forensic evidence excluded if the analyst is unavailable—in those cases in which the defendant will never cross-examine the analyst because he has no genuine interest in confronting her. That interest counsels against expanding the confrontation right beyond its recognized purpose: ensuring that criminal defendants have an adequate opportunity to cross-examine the witnesses against them.

ARGUMENT

THE RIGHT TO CROSS-EXAMINE FORENSIC ANALYSTS WHOSE CERTIFICATES ARE ADMITTED AT TRIAL SATISFIES THE CONFRONTATION CLAUSE

The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const. Amend. VI. In *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527 (2009), this Court held that the preparer of a certificate of forensic analysis qualifies as a witness subject to confrontation. *Id.* at 2532. The Court also made clear, however, that States may validly require criminal defendants to notify the government before trial if they object to the admission of a certificate of analysis without having the opportunity to confront the analyst at trial. *Id.* at 2541.

Petitioners do not dispute that States may treat a defendant's failure to raise a timely Confrontation Clause objection in accordance with state procedural rules as a waiver of the confrontation right. See Pet. Br. 8-9. Nor do they dispute that, at the time of their trials,

Virginia law required defendants to raise any Confrontation Clause objections by summoning the analyst, or requesting that the prosecution or trial court issue a summons, so that the analyst would be available at trial for cross-examination. See J.A. 209-210. Petitioners instead argue that they could not have waived their Confrontation Clause objections by failing to comply with that procedure, because a defendant's Virginia-law right to cross-examine analysts is insufficient to safeguard the defendant's constitutional right "to be confronted with the witnesses against him."

Petitioners' argument rests in large measure on their incorrect assumption that, had they requested that the analysts appear for cross-examination and the analysts failed to appear, the state courts could nevertheless have admitted the certificates of analysis into evidence. Petitioners did not test that assumption in their own cases, and respondent disavows it. See Resp. Br. 9, 16-18.

If Virginia law is understood to place the risk of the analyst's non-appearance on the Commonwealth, it provided petitioners with precisely what the Confrontation Clause demands: an opportunity "to be confronted with the witnesses against" them. The Virginia Supreme Court correctly concluded that, by declining that opportunity, petitioners relinquished their right to object to the admission of the certificates of analysis on Confrontation Clause grounds.

A. The Confrontation Clause Entitles Criminal Defendants To Cross-Examine The Witnesses Against Them

1. The Sixth Amendment's confrontation guarantee "has long been read as securing an adequate opportunity to cross-examine adverse witnesses." *United States* v. *Owens*, 484 U.S. 554, 557 (1988). The "particular vice

that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates, thus denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact." *California* v. *Green*, 399 U.S. 149, 156 (1970); accord *Crawford* v. *Washington*, 541 U.S. 36, 50 (2004). The Confrontation Clause thus ordinarily ensures that witnesses will face the defendant at trial, testify under oath, submit to cross-examination, and enable the trier of fact to observe their demeanor. See, *e.g.*, *Maryland* v. *Craig*, 497 U.S. 836, 845-846 (1990); see also, *e.g.*, *Coy* v. *Iowa*, 487 U.S. 1012, 1016 (1988). Its "central concern" is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Craig*, 497 U.S. at 845; accord *Crawford*, 541 U.S. at 61 ("[T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.").

Consistent with its origin and purposes, the Confrontation Clause forbids "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford*, 541 U.S. at 53-54; see *id.* at 43. Once "the declarant appears for cross-examination at trial," however, "the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* at 60 n.9 (citing *Green*, 399 U.S. at 162). And the "right to confrontation may, of course, be waived, including by failure to object

to the offending evidence" in accordance with state procedural rules. *Melendez-Diaz*, 129 S. Ct. at 2534 n.3; see *id.* at 2541.

2. This Court has held, as the court below assumed, J.A. 194, that certificates of forensic analysis are "testimonial" statements that implicate the Confrontation Clause. *Melendez-Diaz*, 129 S. Ct at 2532. Although Virginia law permits the use of such certificates as substantive evidence, see Va. Code Ann. § 19.2-187 (Supp. 2005), it also provides that a criminal defendant "shall have the right to call" the analyst as a witness and "examine him in the same manner as if he had been called as an adverse witness," *id.* § 19.2-187.1 (2000).

Those provisions, as the Virginia Supreme Court explained, provide a means for criminal defendants to "insure[] the physical presence of the forensic analysts at trial," to place them under oath, and to cross-examine them. J.A. 200. By giving defendants the opportunity to cross-examine the forensic analysts face-to-face and under oath, limited only by a requirement that the defendant make a pretrial demand, see J.A. 209-210, Section 19.2-187.1 preserves criminal defendants' confrontation rights. See J.A. 200-201.

3. Petitioners' principal contention (Pet. Br. 10-13) is that the Virginia Supreme Court's conclusion cannot survive *Melendez-Diaz*, which held that the power to subpoena witnesses pursuant to state law, or under the Compulsory Process Clause, is "no substitute for the right of confrontation." 129 S. Ct. at 2540. Unlike the "subpoena scheme" (Pet. Br. 13) at issue in *Melendez-Diaz*, however, Section 19.2-187.1 adequately safeguards the right of confrontation.

a. In *Melendez-Diaz*, the Court rejected the argument that no Confrontation Clause violation occurs when

a certificate of analysis is entered into evidence, so long as the defendant has an ability to subpoena the analyst. 129 S. Ct. at 2540. The Court explained that the power to subpoena a witness, whether under state law or under the Compulsory Process Clause, is "of no use to the defendant when the witness is unavailable or simply refuses to appear." *Ibid.* And "[m]ore fundamentally," the Court explained, "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Ibid.* In short, "a system in which the prosecution presents its evidence via *ex parte* affidavits and waits for the defendant to subpoena the affiants if he chooses," *ibid.*, would permit the government to admit out-of-court testimonial statements without affording the defendant an opportunity to subject the witness's testimony to adversarial testing.

b. Petitioners' reliance on *Melendez-Diaz* in this case rests largely on an assumption that Section 19.2-187.1, like the subpoena provisions at issue in *Melendez-Diaz*, provides no more than a mechanism for defendants to attempt to hale witnesses into court and offers no recourse in the event that the witness fails to appear. See Pet. Br. 17-18. Petitioners did not test that assumption in their own cases, since they never took the first step of requesting the analysts' presence at their trials. And the assumption is unfounded. The Virginia Supreme Court noted that, had petitioners invoked Section 19.2-187.1, they "could have insured" the analysts' presence at trial. J.A. 200. And although the court had no occasion to address explicitly the consequences of an analyst's failure to appear, respondent acknowledges that the consequence is the exclusion of the certificate of analysis from evidence. Resp. Br. 9, 16-18. So under-

stood, Section 19.2-187.1 does not "shift[] the consequences of adverse-witness no-shows from the State to the accused." *Melendez-Diaz*, 129 S. Ct. at 2540.

Although petitioners seek to minimize the point (Pet. Br. 13), Section 19.2-187.1 also assigns to the government the logistical burdens of producing the analyst. If a defendant chooses to summon the analyst, the statute provides that the analyst will "appear at the cost of the Commonwealth," regardless of the defendant's financial circumstances. Va. Code Ann. § 19.2-187.1 (2000). And as the court below made clear, the defendant need not undertake himself to issue the summons, but may instead "ask[] the trial court or Commonwealth to do so." J.A. 200.

Understood in that manner, Virginia law requires only that a defendant give timely notice of his wish to have the analyst produced for cross-examination at trial. See J.A. 200; see also J.A. 201-204. That is hardly an intolerable burden. As this Court has explained, "[t]he defendant *always* has the burden of raising his Confrontation Clause objection," and "[t]here is no conceivable reason why he cannot * * * be compelled to exercise his Confrontation Clause rights before trial." *Melendez-Diaz*, 129 S. Ct. at 2541.

B. The Confrontation Clause Does Not Dictate The Order Of Proof At Trial

Petitioners also contend (Pet. Br. 8, 16, 18-24) that Section 19.2-187.1 is constitutionally "inadequate" because it speaks only of the defendant's right to call the analyst as an adverse witness and not the prosecutor's duty to call the analyst to the stand first.

As respondent notes (Resp. Br. 19-24), petitioners' contention has an abstract and speculative character. Had petitioners invoked their right to have the analyst

available for cross-examination under Section 19.2-187.1, their trials may well have proceeded according to their preferred sequence of events. Section 19.2-187.1 permits a defendant to summon a forensic analyst for cross-examination, but it does not prevent the prosecution from deciding to call the witness to the stand first. A prosecutor has substantial tactical incentives to do just that; on direct examination, the prosecution can draw out the analyst's background and qualifications and highlight the strength of the evidence against the accused. And the trial courts here may have structured the order of proof in that manner. But as the court below noted, "[b]ecause [petitioners] did not avail themselves of the opportunity to require the presence of a particular forensic analyst at trial, * * * 'the trial court never had occasion to address the proper order of proof.'" J.A. 205 (quoting *Brooks* v. *Commonwealth*, 638 S.E.2d 131, 138 (Va. Ct. App. 2006)); cf. *Luce* v. *United States*, 469 U.S. 38, 42-43 (1984) (holding that, to raise and preserve a challenge to a trial court's in limine ruling permitting the government to impeach him with a prior conviction, the defendant must first testify; otherwise it is "a matter of conjecture" whether the challenged impeachment would have occurred).

Should the Court nevertheless decide to entertain petitioners' challenge, it should reject their invitation to read the Confrontation Clause as dictating a particular sequence of events at trial. Petitioners' argument finds scant support in the text or history of the provision, and it would risk transforming a wide variety of matters traditionally committed to trial judges' discretion into matters of constitutional concern.

1. The Sixth Amendment's text does not mandate a particular order of proof

1. Petitioners contend (Pet. Br. 14) that their proposed reading of the Confrontation Clause follows from the use of the passive "to be confronted" rather than the active "to confront." But they fail to explain how the use of the passive voice in the Confrontation Clause suggests anything about the order of proof at trial. To the extent the use of the passive voice has any meaning, a more natural understanding would relate to the government's duty to produce the witness for cross-examination.

In any event, the use of the passive voice in the Confrontation Clause will not bear the weight that petitioners would place on it. Several 18th-century state counterparts that "guaranteed a right of confrontation," *Crawford*, 541 U.S. at 48, use the active voice to describe the confrontation right. See N.C. Const., Declaration of Rights § 7 (1776) ("every man has a right * * * to confront the accusers and witnesses with other testimony"); Del. Const. Art. I, § 7 (1792) ("the accused hath a right * * * to meet the witnesses in their examination face to face"); Ky. Const. Art. XII, § 10 (1792) ("meet the witnesses face to face"); Mass. Const. Pt. 1, Art. 12 (1780) ("meet the witnesses against him face to face"); N.H. Const. Pt. 1, Art. XV (1783) (same); Pa. Const., Declaration of Rights § 9 (1776) ("meet the witnesses face to face"); Tenn. Const. Art. XI, § 9 (1796) (same). No historical source of which we are aware suggests that the Sixth Amendment attempted to capture a different idea.

This Court, too, has frequently used the active voice to describe the confrontation right as, for example, the right "to confront one's accusers." *E.g.*, *Florida* v. *Nixon*, 543 U.S. 175, 187 (2004); *Crawford*, 541 U.S. at 43;

Craig, 497 U.S. at 849-850; *Boykin* v. *Alabama*, 395 U.S. 238, 243 (1969). Nothing in this Court's cases indicates that the use of the passive voice in the Confrontation Clause is anything but "adventitious." Pet. Br. 14.

2. Petitioners also contend (Pet. Br. 14-15) that their reading finds support in the "sharp contrast" between a defendant's Sixth Amendment right "to be confronted with the witnesses against him" and his right "to have compulsory process for obtaining witnesses in his favor." U.S. Const. Amend. VI. Again, however, petitioners do not explain how that "contrast" relates to the order of proof at trial.

This Court explained in *Melendez-Diaz* that "[t]he text of the [Sixth] Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter." 129 S. Ct. at 2534 (footnote omitted). The Court also stated that the Confrontation Clause, in contrast to the Compulsory Process Clause and to state-law subpoena provisions, "imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* at 2540; see Pet. Br. 14.

A State respects the distinction between the two constitutional guarantees, however, by requiring the government to bear the burden of bringing adverse witnesses into court and to suffer the consequences if the witnesses fail to appear. See pp. 13-15, *supra*. Whether the government must not only produce the analyst at trial, but also elicit the analyst's live testimony during its case-in-chief is a different question—which the grammatical differences between the Confrontation Clause and the Compulsory Process Clause do not answer.

Petitioners note (Pet. Br. 14-15) that this Court has described most Sixth Amendment rights, in contrast to the right of compulsory process, as requiring "no action by the defendant." *Taylor* v. *Illinois*, 484 U.S. 400, 410 & n.14 (1988). That observation reflects the reality that, in order to satisfy its burden in a criminal case, the government must provide notice and trial procedures that comport with the Sixth Amendment, while the compulsory process right "is dependent entirely on the defendant's initiative." *Id.* at 410. *Taylor* does not address what procedures must be followed in order to ensure that the government's evidence satisfies the Confrontation Clause, much less hold that a state-law right of cross-examination is sufficient for Confrontation Clause purposes only if it is accompanied by a state-law guarantee that the prosecutor will question the witness first.

2. History furnishes no basis for reading the Confrontation Clause to require a particular order of proof at trial

Petitioners cite no evidence, and we are aware of none, that suggests that the Framers would have understood the Confrontation Clause to compel a particular order of proof at trial.

The right to confrontation arose as a reaction to the practice of reading official examinations at trial "in lieu of live testimony, a practice that 'occasioned frequent demands by the prisoners to have * * * the witnesses against him * * * brought before him face to face.'" *Crawford*, 541 U.S. at 43 (quoting 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 326 (1883)); see, *e.g.*, *Raleigh's Case*, 2 How. St. Tr. 1, 15-16 (1603) ("Call my accuser before my face."). Consistent with its origins, the irreducible minimum of the confrontation right is the opportunity to cross-examine. The

traditional rule governing out-of-court statements of unavailable witnesses illustrates the centrality of that right: An unavailable witness's out-of-court statements were (and are) admissible, even though the witness never appears at trial (and thus can never be called to the stand by *either* the prosecution or the defense), so long as the defendant had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 53-54, 59.

Certainly in Sir Walter Raleigh's era, the now-familiar order of events in a criminal trial had not yet gained currency; Raleigh's trial itself consisted of an unstructured "altercation between the prisoner, the counsel for the crown, and the court." 9 W.S. Holdsworth, *A History of English Law* 227 (1st ed. 1926). Raleigh's cry of "[c]all my accuser before my face," 2 How. St. Tr. at 15-16, presumably was meant as a request to have Lord Cobham participate in the give and take of the altercation, as opposed to a request that the king's counsel question Cobham during a phase of trial denominated "the prosecution's case-in-chief" before Raleigh conducted cross-examination.

During the eighteenth century, the "rambling altercation" that had long characterized the English criminal trial began to give way to "that articulation of sequence into prosecution and defense 'cases' that so characterizes adversary procedure." John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. Chi. L. Rev. 1, 130-131 (1983). That development appeared to coincide with rules permitting defense counsel to play a greater role in criminal proceedings, as well as increased attention to the parties' burdens of proof. *Ibid.* But the historical record contains little suggestion that a particular order of proof

at trial was thought necessary to preserve the defendant's right to confront his accusers.

Available evidence of trial practice in the Colonies and the early Republic reinforces that conclusion. At the Boston Massacre Trial of 1770, for example, "witnesses were called out of order (Crown witnesses were called in the middle of the defense's case); [and] rebuttal witnesses were called immediately, to refute specific segments of testimony." 3 *Legal Papers of John Adams* 27 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (editorial note); see also Randolph N. Jonakait, *The Orgins of the Confrontation Clause: An Alternative History*, 27 Rutgers L.J. 77, 138 n.267 (1995) ("Witnesses were permitted to be immediately recalled in order to expose contradictions. For example, after a prosecution witness testified that a soldier had fired and had not fallen or been knocked down beforehand, the defense was permitted to immediately recall their witness to counter that testimony."). And at the 1807 treason trial of Aaron Burr, both sides repeatedly interrupted witness examinations to ask questions of their own. See, *e.g.*, 1 David Robertson, *Reports of the Trials of Colonel Aaron Burr for Treason* 473-485 (1808). Members of the jury, too, occasionally interjected with questions for the witnesses. See, *e.g.*, *id.* at 496, 517. There is little evidence that the participants in those trials attached great significance to the matters petitioners now raise.

3. Tactical considerations do not justify expanding the Confrontation Clause right to include the order of proof at trial

Petitioners assert at length (Pet. Br. 15-16, 18-24) that cross-examination is "far riskier and less attractive" without a guarantee that the prosecution will call the analyst to the stand and question her first. The Con-

frontation Clause, however, does not, and could not feasibly, guarantee the "[s]cenario" that petitioners deem necessary to make cross-examination less "risk[y]" and more "attractive." *Id.* at 18.

1. As this Court has repeatedly explained, "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam); accord, *e.g.*, *Owens*, 484 U.S. at 559. Subject-matter restrictions on scope of cross-examination may unconstitutionally restrict that opportunity. See *Delaware* v. *Van Ardsall*, 475 U.S. 673, 679 (1986) (Confrontation Clause violated where a defendant was not permitted to inquire into possible bias resulting from State's dismissal of criminal charges against the witness); see also *Davis* v. *Alaska*, 415 U.S. 308, 309 (1973); *Smith* v. *Illinois*, 390 U.S. 129, 131-132 (1968). But where "defense counsel receives wide latitude at trial to question witnesses," the Court has generally considered the Confrontation Clause to be satisfied. *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 53 (1987) (plurality opinion).

This Court has never held that the Confrontation Clause provides not only latitude to cross-examine an adverse witness, but an option to insist on petitioners' preferred sequence of events at trial. On the contrary, this Court has recognized that the power to manage the order of proof at trial is a matter traditionally committed to the sound discretion of trial courts. See, *e.g.*, *Huddleston* v. *United States*, 485 U.S. 681, 690 (1988) ("The trial court has traditionally exercised the broadest sort of discretion in controlling the order of proof at trial."); *Geders* v. *United States*, 425 U.S. 80, 86 (1976)

("The trial judge must meet situations as they arise and to do this must have broad power to cope with the complexities and contingencies inherent in the adversary process. To this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion."); *Goldsby* v. *United States*, 160 U.S. 70, 74 (1895) (within court's discretion to allow evidence during prosecution's rebuttal case even if it should have been adduced in opening case); see also, *e.g.*, Fed. R. Evid. 611(a) ("The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence."); 28 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6164, at 347-391 (1993) (cataloguing applications of Rule 611(a)). Trial courts frequently exercise that discretion to "permit deviations" from the "conventional order of proof where deviations can save time, avoid confusion and prejudice, or accommodate witnesses." *Id.* § 6164, at 371-372 & nn.96-101. Courts may, for example, provisionally admit evidence whose admissibility depends on later witness testimony, see, *e.g.*, *United States* v. *Newton*, 326 F.3d 253, 257 (1st Cir. 2003); permit one party to call a witness during the other side's case, see, *e.g.*, *United States* v. *Jones*, 438 F.2d 1199, 1200 (6th Cir.) (per curiam), cert. denied, 404 U.S. 913 (1971); or authorize a party to reopen its case to present new evidence, see, *e.g.*, *United States* v. *Faul*, 748 F.2d 1204, 1218 (8th Cir. 1984), cert. denied, 472 U.S. 1027 (1985).

3. Petitioners offer no valid reason to read the Confrontation Clause as an implicit limitation on trial judges' broad discretion to manage the order of proof at criminal trials.

a. Although petitioners suggest (Pet. Br. 18-19, 21) that their reading will ensure that prosecutors elicit the adverse testimony of a witness immediately before cross-examination, the Confrontation Clause can contain no such guarantee. "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Crawford*, 541 U.S. at 60 n.9. The prosecutor need not ask the declarant to repeat his out-of-court statement while he is on the stand. That statement is admissible even if the declarant no longer remembers its substance, see *Owens*, 484 U.S. at 559-560, or now tells a different story, see *Green*, 399 U.S. at 150, 164.

That rule has special resonance here. In many cases, a witness's recorded recollection will be superior to his present recall on the stand. Forensic analysts, for example, "perform[] hundreds if not thousands of tests each year and will not remember a particular test or the link it had to the defendant." *Melendez-Diaz*, 129 S. Ct. at 2548 (Kennedy, J., dissenting). The analyst's report is thus typically better evidence than her in-court testimony, just as out-of-court identifications are routinely thought to be more accurate than in-court showups. See *Gilbert* v. *California*, 388 U.S. 263, 272 n.3 (1967). As long as the defendant has the opportunity to cross-examine on the witness's forgetfulness or "his lack of care and attentiveness," the Confrontation Clause is satisfied. *Owens*, 484 U.S. at 559.

A right to immediate cross-examination of an out-of-court declarant, of the kind petitioners seek, would radically alter existing practice. For example, Federal Rule of Evidence 801(d)(1), as well as many state evidence codes, permits the introduction of certain prior state-

ments so long as the witness "testifies at the trial or hearing and is subject to cross-examination." In *Green*, which involved a similar state rule, a recalcitrant witness contradicted earlier statements to a police officer. 399 U.S. at 151-152. After the witness's testimony, the officer took the stand, and the witness's prior statements were admitted as substantive evidence. *Id.* at 152. That common practice of introducing the prior inconsistent statement through a later witness has not been thought to violate the Confrontation Clause, even though the declarant is not on the stand and therefore not subject to immediate cross-examination. See, *e.g.*, *United States* v. *Tran*, 568 F.3d 1156, 1161 (9th Cir. 2009). If the defendant wishes to cross-examine the declarant about an out-of-court statement admitted after she has stepped down, he may ask to recall her for cross-examination. See, *e.g.*, *United States* v. *Butterworth*, 511 F.3d 71, 75-76 (1st Cir. 2007), cert. denied, 129 S. Ct. 37 (2008).

Any demand for immediate cross-examination, as part of the constitutional confrontation right, would also ignore the reality of the trial process. A witness could be examined immediately before a lunch, overnight, or weekend recess. A witness could become ill or face an unforeseen circumstance that temporarily renders him unavailable and requires cross-examination to take place later. One witness's schedule may require the court to take his testimony out of order, interrupting the examination of a second witness. Any such common circumstance may mean that a defendant's cross-examination will be disconnected from the adverse testimony, and that testimony not so fresh in the mind of the trier of fact. But this time delay need not make the cross-examination any less effective, and in any event, "successful

cross-examination is not the constitutional guarantee." *Owens*, 484 U.S. at 560.

b. Petitioners next contend (Pet. Br. 20-22) that defense counsel's decision to call a witness to the stand may be viewed as "annoying" or "harass[ing]," may unduly "raise[] expectations," or may elevate the witness's "prominen[ce]" in the eyes of the trier of fact. The assumption that judges or juries generally will think it amiss if the defense calls a forensic analyst for cross-examination is unfounded. To the contrary, the jury may well consider the prosecution's failure to call the analyst to be suspicious, making any points that the defendant scores on cross-examination particularly effective and advantageous.

Petitioners suggest that, if a defendant were required to call a child victim of abuse to the stand in order to exercise his right to cross-examination, his action would run an intolerable risk of "inflaming the jury." Pet. Br. 20 (quoting *Lowery* v. *Collins*, 988 F.2d 1364, 1369 (5th Cir. 1993)). Trial judges, however, may respond to such concerns in particular cases by instructing the jury that it is to consider all evidence presented, whether by the government or the defense, and should not consider which side called the witness. Alternatively, the trial judge may decline to identify the party responsible for calling the witness to the stand, or may inform the jury that the witness is in fact a prosecution witness being called to the stand for purposes of cross-examination. Trial courts use instructions to mitigate other forms of potential prejudice that might arise from the conduct of the defense. See, *e.g.*, *Carter* v. *Kentucky*, 450 U.S. 288, 305 (1981) (court must, on request, instruct the jury that the defendant's failure to testify cannot support an inference of guilt). "[T]he almost in-

variable assumption of the law [is] that jurors follow their instructions." *Richardson* v. *Marsh*, 481 U.S. 200, 206-207 (1987). And a defendant could assert that the absence of procedures to mitigate potential prejudice violated due process in a particular case. In any event, whatever concerns may arise in cases involving young or particularly vulnerable victims have little relevance in a case involving the testimony of forensic analysts, and do not justify creating an across-the-board entitlement under the Confrontation Clause to have the prosecution call the witness to the stand during its case-in-chief.

c. Finally, petitioners suggest (Pet. Br. 14, 23-24) that their proposed order of proof is necessary to permit a defendant to make "a clean, uncluttered argument that the prosecution has failed to satisfy its burden of persuasion," regardless of whether the defendant chooses to put on an affirmative case. *Id.* at 24.

But a defendant may always argue that the prosecution has not proved the defendant's guilt beyond a reasonable doubt, regardless of whether defense cross-examination immediately follows an analyst's direct testimony, and regardless of whether it occurs in a phase of the trial denominated "the prosecution's case-in-chief." And if a defendant has concerns that the jury may become confused about the prosecution's burden, he may request that the court remind the jury that the prosecution bears the burden of proof and that the analyst is being called for cross-examination in order to challenge whether the government has met this burden. In this case, none of those options was explored because petitioners elected not to request the analysts' presence.

4. Permitting the order of proof contemplated by the Virginia statute does not, as petitioners suggest (Pet. Br. 24), "work a fundamental transformation in

criminal procedure" that would "turn the heart of the trial into a presentation of affidavits," followed by cross-examination in the defense case. Well-established hearsay rules generally forbid the introduction of out-of-court statements as evidence of the matter they assert. Although States have created limited exceptions to those rules to achieve certain policy objectives, as in Section 19.2-187, see Resp. Br. 2, restrictions on the admission of hearsay remain the norm in criminal trials. The prosecution's need to carry its burden of persuasion and meet juror expectations provides a further check on the possibility of trial by affidavit.

In any event, at issue here is only whether the Confrontation Clause confers a right to a certain order of proof in every case in which the prosecution seeks to introduce an out-of-court statement, including a routine forensic laboratory report. See Pet. Br. 5 n.2. The rigid Confrontation Clause rule that petitioners demand would have little substantive effect. Even if States were required to call a witness to the stand during the prosecution's case-in-chief to admit a testimonial out-of-court statement, the Confrontation Clause (as opposed to state evidentiary law) would not forbid the prosecutor from entering or simply reading into evidence the witness's prior *ex parte* statement, asking no questions, and then turning the witness over to the defense for cross-examination. See p. 24, *supra* (explaining that the Confrontation Clause does not require a declarant to repeat the substance of his out-of-court testimony on the stand). Indeed, the prosecution could also present a forensic analyst in that manner as its final witness and could announce to the jury, after reading the analyst's report, that the prosecution's case is over. That approach would be functionally equivalent to the regime

permitted under the Virginia statute. Drawing a constitutional line between the two scenarios has no basis in the "central concern" of the Confrontation Clause, which is to afford the defendant an opportunity to confront and cross-examine a witness whose testimonial statement is admitted as evidence against him. See *Craig*, 497 U.S. at 845; accord *Crawford*, 541 U.S. at 61-62. The Clause does not seek to constitutionalize the rules of evidence, nor mandate a sequence of events at trial that makes cross-examination as risk-free and attractive as the defendant might wish. See *Fensterer*, 474 U.S. at 20.

C. States Should Have Latitude To Design Notice-And-Demand Rules To Reduce Gamesmanship While Protecting Genuine Interests In Cross-Examination

Contrary to petitioners' argument (Pet. Br. 29-35), States have legitimate reasons to enact a range of notice-and-demand statutes, including one like Virginia's, that efficiently protect defendants' right to cross-examination.

1. Laboratory reports are, as petitioners acknowledge, "an essential part of the routine of modern criminal procedure." Pet. Br. 24. Scientific evidence is a critical component of many criminal prosecutions, particularly in cases, like petitioners', that involve drug offenses. As a result, forensic scientists conduct a staggering number of laboratory analyses each year for use in criminal prosecutions. See *Melendez-Diaz*, 129 S. Ct. at 2549-2550 (Kennedy, J., dissenting).

The rules governing the admission of laboratory reports in criminal prosecutions thus have important practical implications for the operation of the criminal justice system. This Court has made clear that criminal defendants must be afforded an opportunity to test the reliability of forensic evidence "in the crucible of cross-

examination." *Melendez-Diaz*, 129 S. Ct. at 2536 (quoting *Crawford*, 541 U.S. at 61); see also *id.* at 2537 ("[A]n analyst's lack of proper training or deficiency in judgment may disclosed in cross-examination."); *id.* at 2538 (defendants may test "analysts' honesty, proficiency, and methodology—the features that are commonly the focus in the cross-examination of experts"). The right to cross-examination, however, also provides defendants who have no intention of testing the reliability of forensic evidence with a formidable power: the power to obtain the exclusion of evidence, and possibly the dismissal of charges, in the event "the analyst cannot reach the courtroom in time to testify." *Id.* at 2556-2557 (Kennedy, J., dissenting). That power creates a substantial incentive to call the analyst away from her laboratory to court, even if the defendant has no interest in challenging the analyst's testimony.

Petitioners suggest (Pet. Br. 34-35) that States struggling with increased demand for analysts' appearance, or concerned about analyst unavailability, simply hire more forensic analysts and schedule more pre-trial depositions. Those suggestions ignore the fiscal and scheduling constraints that face forensic laboratories and prosecution agencies across the country. States have a valid interest in not being forced to pay the needless expense of bringing forensic analysts to court—and to suffer dismissal of the charges if it fails in that endeavor—in those cases in which the defendant will never cross-examine the analyst because he has no genuine interest in confronting her.

2. Petitioners argue (Pet. Br. 31-33) that what they call a "simple notice-and-demand statute"—*i.*e., one that provides that "the *prosecution* must call the author of the report" if the defendant so demands—is more than

sufficient to mitigate any undue burden on the States. In petitioners' view, such a statute "ensures that the lab technician will be required to testify subject to confrontation only when the accused has a strong enough interest in cross-examining her to be worth the cost to him of causing the technician's testimony to be presented live." *Id.* at 32.

Petitioners are correct that simple notice-and-demand statutes can mitigate some of the burden on the States. But in the government's experience, such statutes do not, as petitioners suggest, "operate[] efficiently," Pet. Br. 32, to separate those defendants who truly desire to challenge the analyst's conclusions from those who have no intention of doing so, but nevertheless raise Confrontation Clause objections before trial in the hope that "the analyst fails to appear and the government's case collapses," *Melendez-Diaz*, 129 S. Ct. at 2557 (Kennedy, J., dissenting).

For example, in the District of Columbia, the Court of Appeals recently reinterpreted the District's counterpart to Section 19.2-187.1 to mean that, if the defense so demands, the "prosecution must call the chemist in its case." *Thomas* v. *United States*, 914 A.2d 1, 19-20 (D.C. 2006), cert. denied, 128 S. Ct. 241 (2007). Before *Thomas*, chemists for the federal Drug Enforcement Administration (DEA) laboratory that analyzes controlled substances for the District were subpoenaed to testify in the local courts approximately seven to ten times per month. But after the Court of Appeals converted the District's Virginia-type statute into a simple notice-and-demand statute of the kind petitioners favor, the demand for court appearances rose to more than 50 per month as defendants exercised their newly recognized right and refused to enter pretrial stipulations. While the initial

demand has receded somewhat, in fiscal year 2009, the chemists have still been summoned to court an average of 24 times per month. As a result, the DEA laboratory has been forced to increase its turnaround time on chemical analyses, extend the laboratory's hours of operation, and pay additional overtime expenses.[2]

While the number of analyst trips to the courthouse has risen significantly under the new system, the number of actual in-court appearances has not increased nearly so much. Many defendants offer to stipulate at trial, after realizing that the analyst stands ready to testify. Even when the witness is called, whether because the defense still refuses to stipulate or because the government declines the belated stipulation, the cross-examination right in this context rarely appears to be serving any substantive purpose: District's experience (apparently like that in Michigan, see Pet. Br. App. 9-14), is that defense counsel may ask at most a handful of mundane questions of the witness, rarely taking up more than a few minutes and transcript pages.

3. Virginia law differs from a simple notice-and-demand scheme primarily by conferring no guarantee that the prosecution will question the analyst; it guarantees only that the defendant will have an opportunity to cross-examine her. Virginia's law may thus more successfully elicit a defendant's interest in cross-examination and more effectively reduce gamesmanship. In a simple notice-and-demand regime, a defendant may exercise his rights only in order to test the government's ability to produce the analyst at trial; the defendant has signaled no interest in actually cross-examining. In a cross-examination-focused regime, in contrast, a defen-

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[2] See Letter from James V. Malone, Director, DEA Mid-Atl. Lab. (Oct. 30, 2009).

dant who invokes his rights presumably intends, in fact, to test the analyst's testimony through his examination. Having created that expectation, it is less likely that the defendant will want to "antagonize the judge or jury by wasting their time with the appearance of a witness whose testimony defense counsel does not intend to rebut in any fashion." *Melendez-Diaz*, 129 S. Ct. at 2542. Given the potential for defense gamesmanship, States can legitimately seek to elicit whether a defendant who insists on the analyst's presence at trial does so because he wishes to cross-examine her.

Petitioners mistakenly argue (Br. 32) that "[a]ny *incremental* savings generated" by Virginia's scheme "must be the result of impairing the right of the accused to examine the lab technician." But under that scheme, petitioners had a fully adequate opportunity to cross-examine the analyst on her report. To the extent that they preferred that the analyst have repeated or summarized that report live from the stand at the prosecutor's behest before deciding whether to cross-examine, the Confrontation Clause provides no such guarantee. See p. 24, *supra*. And to constitutionalize the right to insist that the prosecution call the analyst first, even when the defendant has no interest in cross-examining, would exact a substantial price in the fair and efficient administration of criminal justice. Nothing in the Confrontation Clause requires society to pay that price.

CONCLUSION

The judgment of the Supreme Court of Virginia should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

2. Section 19.2-187 of the Code of Virginia Annotated (Supp. 2005), provides:

> **Admission into evidence of certain certificates of analysis.**—In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and

Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory when such certificate is duly attested by such person, shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and (ii) a copy of such certificate is mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request made by such counsel to the clerk with notice of the request to the attorney for the Commonwealth. The request to the clerk shall be on a form prescribed by the Supreme Court and filed with the clerk at least 10 days prior to trial. In the event that a request for a copy of a certificate is filed with the clerk with respect to a case that is not yet before the court, the clerk shall advise the requester that he must resubmit the request at such time as the case is properly before the court in order for such request to be effective.

The certificate of analysis of any examination conducted by the Department of Forensic Science relating to a controlled substance or marijuana shall be mailed or forwarded by personnel of the Department of Forensic Science to the attorney for the Commonwealth of the jurisdiction where such offense may be heard. The attorney for the Commonwealth shall

acknowledge receipt of the certificate on forms provided by the laboratory.

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

3. Section 19.2-187.1 of the Code of Virginia Annotated (2000), provides:

Right to examine person performing analysis or involved in chain of custody.—The accused in any hearing or trial in which a certificate of analysis is admitted into evidence pursuant to § 19.2-187 or § 19.2-187.01 shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

4. Section 19.2-187 of the Code of Virginia Annotated (Adv. Code Serv. 2010), provides:

Admission into evidence of certain certificates of analysis.—In any hearing or trial of any criminal offense or in any proceeding brought pursuant to Chapter 22.1 (§ 19.2-386.1 et seq.) of this title, a certificate of analysis of a person performing an analysis or examination, duly attested by such person, shall

be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the proceeding if the attorney for the Commonwealth intends to offer it into evidence in a preliminary hearing or the accused intends to offer it into evidence in any hearing or trial, or (ii) the requirements of subsection A of § 19.2-187.1 have been satisfied and the accused has not objected to the admission of the certificate pursuant to subsection B of § 19.2-187.1, when any such analysis or examination is performed in any laboratory operated by the Division of Consolidated Laboratory Services or the Department of Forensic Science or authorized by such Department to conduct such analysis or examination, or performed by a person licensed by the Department of Forensic Science pursuant to § 18.2-268.9 or 46.2-341.26:9 to conduct such analysis or examination, or performed by the Federal Bureau of Investigation, the federal Postal Inspection Service, the federal Bureau of Alcohol, Tobacco and Firearms, the Naval Criminal Investigative Service, the National Fish and Wildlife Forensics Laboratory, the federal Drug Enforcement Administration, or the United States Secret Service Laboratory.

In a hearing or trial in which the provisions of subsection A of § 19.2-187.1 do not apply, a copy of such certificate shall be mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at no charge at least seven days prior to the hearing or trial upon request made

by such counsel to the clerk with notice of the request to the attorney for the Commonwealth. The request to the clerk shall be on a form prescribed by the Supreme Court and filed with the clerk at least 10 days prior to the hearing or trial. In the event that a request for a copy of a certificate is filed with the clerk with respect to a case that is not yet before the court, the clerk shall advise the requester that he must resubmit the request at such time as the case is properly before the court in order for such request to be effective. If, upon proper request made by counsel of record for the accused, a copy of such certificate is not mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused in a timely manner in accordance with this section, the accused shall be entitled to continue the hearing or trial.

The certificate of analysis of any examination conducted by the Department of Forensic Science relating to a controlled substance or marijuana shall be mailed or forwarded by personnel of the Department of Forensic Science to the attorney for the Commonwealth of the jurisdiction where such offense may be heard. The attorney for the Commonwealth shall acknowledge receipt of the certificate on forms provided by the laboratory.

Any such certificate of analysis purporting to be signed by any such person shall be admissible as evidence in such hearing or trial without any proof of the seal or signature or of the official character of the person whose name is signed to it.

5. Section 19.2-187.1 of the Code of Virginia Annotated (Adv. Code Serv. 2010), provides:

> **Procedures for notifying accused of certificate of analysis; waiver; continuances.**—A. In any trial and in any hearing other than a preliminary hearing, in which the attorney for the Commonwealth intends to offer a certificate of analysis into evidence pursuant to § 19.2-187, the attorney for the Commonwealth shall:
>
> 1. Provide by mail, delivery, or otherwise, a copy of the certificate to counsel of record for the accused, or to the accused if he is proceeding pro se, at no charge, no later than 28 days prior to the hearing or trial;
>
> 2. Attach to the copy of the certificate so provided under subdivision 1 a notice to the accused of his right to object to having the certificate admitted without the person who performed the analysis or examination being present and testifying; and
>
> 3. File a copy of the certificate and notice with the clerk of the court hearing the matter on the day that the certificate and notice are provided to the accused.
>
> B. The accused may object in writing to admission of the certificate of analysis, in lieu of testimony, as evidence of the facts stated therein and of the results of the analysis or examination. Such objection shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the certificate and notice were filed with the clerk by the attorney for the

Commonwealth or the objection shall be deemed waived. If timely objection is made, the certificate shall not be admissible into evidence unless (i) the testimony of the person who performed the analysis or examination is admitted into evidence describing the facts and results of the analysis or examination during the Commonwealth's case-in-chief at the hearing or trial and that person is present and subject to cross-examination by the accused, (ii) the objection is waived by the accused or his counsel in writing or before the court, or (iii) the parties stipulate before the court to the admissibility of the certificate.

C. Where the person who performed the analysis and examination is not available for hearing or trial and the attorney for the Commonwealth has used due diligence to secure the presence of the person, the court shall order a continuance. Any continuances ordered pursuant to this subsection shall total not more than 90 days if the accused has been held continuously in custody and not more than 180 days if the accused has not been held continuously in custody.

D. Any objection by counsel for the accused, or the accused if he is proceeding pro se, to timeliness of the receipt of notice required by subsection A shall be made before hearing or trial upon his receipt of actual notice unless the accused did not receive actual notice prior to hearing or trial. A showing by the Commonwealth that the notice was mailed, delivered, or otherwise provided in compliance with the time requirements of this section shall constitute prima facie evidence that the notice was timely re-

ceived by the accused. If the court finds upon the accused's objection made pursuant to this subsection, that he did not receive timely notice pursuant to subsection A, the accused's objection shall not be deemed waived and if the objection is made prior to hearing or trial, a continuance shall be ordered if requested by either party. Any continuance ordered pursuant to this subsection shall be subject to the time limitations set forth in subsection C.

E. The accused in any hearing or trial in which a certificate of analysis is offered into evidence shall have the right to call the person performing such analysis or examination or involved in the chain of custody as a witness therein, and examine him in the same manner as if he had been called as an adverse witness. Such witness shall be summoned and appear at the cost of the Commonwealth.

AMICUS CURIAE BRIEF

No. 07-11191

IN THE

Supreme Court of the United States

MARK A. BRISCOE and SHELDON A. CYPRESS
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Writ of Certiorari to the
Supreme Court of Virginia

BRIEF OF THE STATES OF INDIANA, MASSACHUSETTS, ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, IOWA, KANSAS, MARYLAND, MICHIGAN, MINNESOTA, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, WASHINGTON, WISCONSIN, WYOMING AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Did the petitioners waive their Confrontation Clause rights by failing to make a demand that the prosecution produce a forensic analyst for trial?

2. Does the Confrontation Clause require the prosecution to present the testimony of prosecution witnesses during the prosecution's case in chief and preclude exhibits from being introduced before the witness's live testimony?

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

Interest of the Amici States 1

Summary of the Argument 2

Argument 5

I. States Need to Balance Lab-Analyst Confrontation Demands with the Efficient Allocation of Scarce Resources 5

A. The sheer volume of drug cases requires special attention to the pitfalls of strict confrontation rights 5

B. After Melendez-Diaz, States face the potential for exponentially more expensive drug prosecutions 7

C. States have been exploring a variety of ways to manage demands to confront lab analysts in court 11

1. Notice-and-Demand Procedures 12

2. Anticipatory Demand Requirements 14

3. Video Conferencing 15

4. Testimony by Surrogates 16

II. The Confrontation Clause's Core Purposes Are Fulfilled if States Make Analysts Available for Cross-Examination at Trial 18

A. Statutes requiring defendants to demand an analyst's presence at trial impose no impermissible burden on Confrontation Clause rights 21

B. Statutes providing defendants with an opportunity to *cross-examine* an analyst during the defense case are likewise constitutionally permissible 27

III. The Court Should Consider Overruling Melendez-Diaz 32

A. Stare decisis permits reconsideration of criminal procedure rights 33

B. For confrontation purposes, there are meaningful differences between lab analysts and conventional witnesses 37

Conclusion 41

TABLE OF AUTHORITIES

CASES

Agostini v. Felton,
521 U.S. 203 (1997) 33

Becker v. St. Louis Trust Co.,
296 U.S. 48 (1935) 33

Bonelli Cattle Co. v. Arizona,
414 U.S. 313 (1973) 35

California v. Green,
399 U.S. 149 (1970) 39

Chambers v. Mississippi,
410 U.S. 284 (1973) 18

Crawford v. Marion County Election Bd.,
-- U.S. --, 128 S.Ct. 1610 (2008) 26

Crawford v. Washington,
541 U.S. 36 (2004) ..... *passim*

Cuadros-Fernandez v. State,
2009 WL 2647890 (Tex. Ct. App. Aug. 28,
2009) 36

Daniels v. Williams,
474 U.S. 327 (1986) 34

Davis v. Alaska,
415 U.S. 308 (1974) 19, 28

CASES [CONT'D]

Davis v. Washington,
547 U.S. 813 (2006) 39

Delaware v. Fensterer,
474 U.S. 15 (1985) ..... *passim*

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 19, 28

Dickerson v. United States,
530 U.S. 428 (2000) 35

Geders v. United States,
425 U.S. 80 (1976) 29

Goldsby v. United States,
160 U.S. 70 (1895) 29

Helvering v. Hallock,
309 U.S. 106 (1940) 33

Helvering v. St. Louis Trust Co.,
296 U.S. 39 (1935) 33

Hepburn v. Griswold,
75 U.S. 603 (1870) 34

Hinojos-Mendoza v. People,
169 P.3d 662 (Colo. 2007) 26

Knox v. Lee (Legal Tender Cases),
79 U.S. 457 (1871) 34

CASES [CONT'D]

Magruder v. Commonwealth,
657 S.E.2d 113 (Va. 2008) ..... *passim*

Maryland v. Craig,
497 U.S. 836 (1990) 18, 19, 29

Mattox v. United States,
156 U.S. 237 (1895) 18, 39, 40

Melendez-Diaz v. Massachusetts,
-- U.S. --, 129 S.Ct. 2527 (2009) ..... *passim*

Michigan v. Lucas,
500 U.S. 145 (1991) 21, 22

Minersville Sch. Dist. v. Gobitis,
310 U.S. 586 (1940) 34

Miranda v. Arizona,
384 U.S. 436 (1966) 35

Ohio v. Roberts,
448 U.S. 56 (1980) 33

Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,
429 U.S. 363 (1977) 35

Parratt v. Taylor,
451 U.S. 527 (1981) 34

Payne v. Tennessee,
501 U.S. 808 (1991) 33

CASES [CONT'D]

Pendergrass v. State,
913 N.E.2d 703 (Ind. 2009) 17

Pennslyvania v. Ritchie,
480 U.S. 39 (1987) 18

People v. Geier,
161 P.3d 104 (Cal. 2007) 17

People v. Gutierrez,
99 Cal. Rptr. 3d 369 (Cal. Ct. App. 2009) .. 17, 36

People v. Heyanka,
2009 WL 2951011 (N.Y. Dist. Ct. Aug. 19, 2009) 36

People v. Lopez,
98 Cal. Rptr. 3d 825 (Cal. Ct. App. 2009) 36

People v. Palmer,
885 N.Y.S. 2d 621 (N.Y. App. Div. 2009) 36

Philadelphia & Trenton R.R. Co. v. Stimpson,
39 U.S. 448 (1840) 29, 31

Planned Parenthood v. Casey,
505 U.S. 833 (1992) 26

St. Joseph Stock Yards Co. v. United States,
298 U.S. 38 (1936) 33

State v. Miller,
790 A.2d 144 (N.J. 2002) 25

CASES [CONT'D]

State v. O'Maley,
932 A.2d 1 (N.H. 2007) 17

State v. Silva,
960 A.2d 715 (N.H. 2008) 17

State v. Willis,
213 P.3d 1286 (Or. Ct. App. 2009) 15

Taylor v. Illinois,
484 U.S. 400 (1988) 21, 25, 26, 31

Taylor v. United States,
414 U.S. 17 (1973) 21

Trupiano v. United States,
334 U.S. 699 (1948) 34

United States v. Baptista-Rodriguez,
17 F.3d 1354 (11th Cir. 1994) 28

United States v. Percheman,
7 Pet. 51, 8 L.Ed. 604 (1833) 38

United States v. Rabinowitz,
339 U.S. 56 (1950) 34

United States v. Washington,
498 F.3d 225 (4th Cir. 2007) 40

Wainright v. Sykes,
433 U.S. 72 (1977) 21

CASES [CONT'D]

West Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943) 34

Williams v. Florida,
399 U.S. 78 (1970) 22

Wood v. United States,
41 U.S. 342 (1842) 30

STATUTES

2009 La. Sess. Law Serv. Act 272 (H.B. 119) 15

Colo. Rev. Stat. Ann. § 16-3-309 ..... 14, 15

N.H. Rev. Stat. Ann. § 516:37 17

Ohio Rev. Code Ann. § 2925.51 14

Or. Rev. Stat. § 475.235(5) 15

Tex. Code Crim. Proc. Ann. art. 38.41 14

Va. Code Ann. § 19.2-187 13

Va. Code Ann. § 19.2-187.1 13

RULES

Ala. R. Evid. 611(a) 30

Alaska R. Evid. 611(a) 30

Ariz. R. Evid. 611(a) 30

RULES [CONT'D]

Ark. R. Evid. 611(a) 30

Colo. R. Evid. 611(a) 30

Del. R. Evid. 611(a) 30

Fed. R. Evid. 611(a) 30

Haw. R. Evid. 611(a) 30

Idaho R. Evid. 611(a) 30

Ind. R. Evid. 611(a) 30

Ind. R. Evid. 803 16

Ky. R. Evid. 611(a) 30

La. Code Evid. Ann. art. 611(a) 30

Me. R. Evid. 611(a) 30

Mich. R. Evid. 611(a) 30

Minn. R. Evid. 611(a) 30

Miss. R. Evid. 611(a) 30

Mont. R. Evid. 611(a) 30

N.C. Gen. Stat. § 8C-1, Rule 611(a) 30

N.D. R. Evid. 611(a) 30

RULES [CONT'D]

Ohio R. Evid. 611(a) 30

S.C. R. Evid. 611(a) 30

S.D. Codified Laws § 19-14-18 30

Tex. R. Evid. 611(a) 30

Utah R. Evid. 611(a) 30

Vt. R. Evid. 611(a) 30

Wash. R. Evid. 611(a) 30

W. Va. R. Evid. 611(a) 30

Wyo. R. Evid. 611(a) 30

OTHER AUTHORITIES

6 John H. Wigmore, *Evidence in Trials at Common Law* § 1867 (Chadbourn ed. 1976) 29

28 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6164 (1993) 30, 31

Ben Conery, *States Scramble to Keep Techs in Labs, Out of Courts*, Washington Times, Aug. 31, 2009, at A1, *available at* http://www.washingtontimes.com/news/2009/aug/31/states-vie-for-lab-techs-in-court 7, 10

OTHER AUTHORITIES [CONT'D]

Indianapolis-Marion County Forensic Services Agency, 2008 Annual Report, *available at* http://www.indy.gov/eGov/County/FSA/Documents/Annual%20Report%2008.pdf 8

Indiana State Police, 2008 Annual Report, *available at* http://www.in.gov/isp/files/Annual_Report_08.pdf 8

Indiana State Police Laboratory Division, 2008 Annual Report, *available at* http://www.in.gov/isp/files/2008_Annual_Report_Laboratory.pdf 8

July 2008 Drug Lab Report, *available at* http://www.mass.gov/Eeohhs2/docs/dph/laboratory_sciences/drug_analysis_report_200807.rtf 8

July 2009 Drug Lab Report, *available at* http://www.mass.gov/Eeohhs2/docs/dph/laboratory_sciences/drug_analysis_report_200907.rtf 8

Matthew R. Durose, Bureau of Justice Statistics Bulletin, Census of Publicly Funded Forensic Crime Laboratories, 2005, Appendix Table 1 (July 2008), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpffcl05.pdf 1

OTHER AUTHORITIES [CONT'D]

Montana Supreme Court—Information Technology, http://www.montanacourts.mt.gov/cao/technology/it_video_confer.asp 16

The National Association on Addiction and Substance Abuse, Shoveling Up II: The Impact of Substance Abuse on Federal, State and Local Budgets 2 (2009), *available at* http://www.casacolumbia.org/absolutenm/articlefiles/380-ShovelingUpII.pdf 6

National Forensic Laboratory Information System, Years 2000-2008 Annual Report, Table 1.1, http://www.deadiversion.usdoj.gov/nflis/index.html 6

Paul Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 700 (1988) 25

Rebecca Waters, *Supreme Court Requires Lab Analysts to Testify: Now What?*, Forensic Magazine, July 24, 2009, *available at* http://www.forensicmag.com/News_Articles.asp?pid=633 ..... 9, 16

OTHER AUTHORITIES [CONT'D]

Supreme Court Ruling in Melendez-Diaz Requires the State to Produce the Chemical Analyst in All DWI Prosecutions, Carolina Newswire, Aug. 7, 2009, http://carolinanewswire.com/news/News.cgi?database=00001news.db&command=viewone&id=902&op=t 9

Tom Jackman, *Prosecutors Worried By High Court Ruling on Lab Evidence*, Washington Post, July 15, 2009, *available at*, http://washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071403565_pf.html 10

Uniform Crime Report, Crime in the United States 2000-2008, Table 29, http://www.fbi.gov /ucr/ucr.htm 5, 6

INTEREST OF THE *AMICI* STATES

The States of Indiana, Massachusetts, Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Iowa, Kansas, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Washington, Wisconsin, Wyoming and the District of Columbia have a compelling interest in allocating their crime-fighting resources in the most efficient and effective manner possible, particularly with respect to the prosecution of drug crimes. And while *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S.Ct. 2527 (2009), applies to any laboratory report, the majority of the cases in which it applies will be drug prosecutions. *See id.* at 2544 (Kennedy, J., dissenting). *Melendez-Diaz* therefore threatens, among other state forensic practices, the ability of States to keep technicians in the laboratory chipping away at the historic backlog of drug analysis requests. *See* Matthew R. Durose, Bureau of Justice Statistics Bulletin, Census of Publicly Funded Forensic Crime Laboratories, 2005, Appendix Table 1 (July 2008) (the backlog exceeded 222,0000 in 2005, the most recent year for which data are available). The *amici* States are therefore interested in urging the Court to either limit or overturn *Melendez-Diaz* so that it does not unnecessarily divert taxpayer resources better spent on fighting and preventing continued drug and other crimes.

SUMMARY OF THE ARGUMENT

Melendez-Diaz was decided only a few months ago, but already data and anecdotal evidence are demonstrating an overwhelming negative impact on drug prosecutions in some states. Prosecutors are negotiating pleas to lesser charges or dropping drug prosecutions altogether because States do not have enough laboratory analysts and other resources to provide a witness in every case.

In response, States are developing a variety of methods to handle the new demand prompted by *Melendez-Diaz*. An inflexible interpretation of the Confrontation Clause threatens these solutions, such as Virginia's notice-and-demand statute, that provide a workable balance of the legitimate competing interests of the prosecution and the defense.

More specifically, interpreting the Confrontation Clause as an absolute command that the prosecution introduce, as part of its case-in-chief, the testimony of the actual lab technician who undertook a forensic test would be a particularly troubling development given that, in the vast majority of drug cases, the defendant will not genuinely contest the accuracy of forensic test results. Such a doctrine would yield dropped charges, acquittals, and reversed convictions, not because forensic test results are genuinely doubted, but because state criminal justice systems will be overwhelmed by the need to produce

in every case the very crime-lab technicians who actually tested the evidence.

The Sixth Amendment does not, standing alone or in light of *Melendez-Diaz*, permit defendants to game the system or require States to waste public funds by producing unwanted witnesses at trial. Confrontation rights are not absolute and may, in appropriate circumstances, be overridden by other legitimate trial process interests. Such circumstances exist in the context of forensic lab reports, particularly in drug cases. The combination of the high volume (and backlogs) of laboratory tests and the dearth of good-faith challenges to test results creates a situation where some regulation of the confrontation right is surely permissible.

At the very least, States may require defendants to provide timely pretrial notice of their intent to demand face-to-face confrontation of drug analysts. As long as the core Confrontation Clause requirement of an opportunity for in-person cross-examination is satisfied, States retain their traditionally broad discretion to regulate criminal trial proceedings, particularly where there is such a high risk for gamesmanship by the defense that can so easily overwhelm state criminal justice systems.

Furthermore, assuming timely demand for an analyst's presence at trial, States may adopt reasonable procedural rules governing when drug analysis certificates may be admitted into evidence and when cross-examination of analysts may occur.

In this regard, admitting lab test results may well present a special circumstance that does not implicate other forms of police testimony. The difference is that a small number of lab technicians are able to generate test results in thousands of cases, as long as they do not have to testify in court as to *all* of them. The same is not true with respect to ordinary police work. States and localities hire far more officers than lab technicians, and each officer's caseload is far more limited than an average lab technician. Requiring officers and detectives to testify at trial during the prosecution's case-in-chief (rather than merely present testimony by affidavit subject to defense demand) does not threaten a dramatic impact on the remainder of the officer's caseload, much less on the entire crime-detection system. That is why states already have special procedures for admitting lab certificates but not police officer testimony.

Finally, the Court should, at this first opportunity, consider overruling *Melendez-Diaz* before it thoroughly wreaks havoc on State criminal justice systems. In his dissent to *Melendez-Diaz*, Justice Kennedy predicted that "[t]he Court purchases its meddling with the Confrontation Clause at a dear price, a price not measured in taxpayer dollars alone. Guilty defendants will go free, on the most technical grounds, as a direct result of [this] decision, adding nothing to the truth-finding process." *Melendez-Diaz*, 129 S.Ct. at 2550 (Kennedy, J., dissenting).

Melendez-Diaz unnecessarily stymies prosecutors and cripples crime labs while providing criminal defendants with little more than a windfall procedural advantage unrelated to guilt or innocence. At the time of the framing, documents created by copyists were admissible without the copyist's live testimony because the copyist himself could not usefully be cross-examined as to the truthfulness of the statements in the copied document. The same is true with respect to laboratory tests run by machines, where the lab technician merely copies and certifies the results for use in court but does not independently "witness" anything implicating the defendant's guilt or innocence. In these circumstances, the Confrontation Clause represents a formalistic procedural hurdle rather than a genuinely useful tool for arriving at the truth.

ARGUMENT

I. States Need to Balance Lab-Analyst Confrontation Demands with the Efficient Allocation of Scarce Resources

A. The sheer volume of drug cases requires special attention to the pitfalls of strict confrontation rights

Since 2000, state and federal law enforcement officials have arrested more than 11 million persons for possessing or trafficking illegal narcotics. *See* Uniform Crime Report, Crime in the United States

2000-2008, Table 29. As the number of arrests escalates, so does the burden on the state and local laboratories charged with analyzing the substances recovered:

Year	Persons Arrested	Substances Analyzed
2000	1,579,566	532,412
2001	1,586,902	1,894,610
2002	1,538,813	1,798,045
2003	1,678,192	1,715,598
2004	1,745,712	1,734,658
2005	1,846,351	1,749,275
2006	1,889,810	1,935,788
2007	1,841,182	1,808,810
2008	1,702,537	1,768,886

See id.; National Forensic Laboratory Information System, Years 2000-2008 Annual Report, Table 1.1. As these numbers show, the war on drugs is far from over.

Nor is it cheap. In 2005 alone, the States spent $135.8 billion—15.7% of our annual budgets—fighting "substance abuse and addiction." The National Association on Addiction and Substance Abuse, Shoveling Up II: The Impact of Substance Abuse on Federal, State and Local Budgets 2 (2009). Of this amount, $8.1 billion was spent in the state courts, $4.5 billion of which funded drug-related criminal cases. *Id.* at 31. *Melendez-Diaz* therefore impacts a high-volume, high-cost subset of criminal prosecutions.

B. After *Melendez-Diaz*, States face the potential for exponentially more expensive drug prosecutions

Melendez-Diaz threatens to dramatically increase the costs of drug prosecutions. The impact in Virginia was swift and certain: the number of subpoenas to the Virginia Department of Forensic Science in drug cases jumped from 43 in July 2008 to 925 in July 2009. Ben Conery, *States Scramble to Keep Techs in Labs, Out of Courts*, Washington Times, Aug. 31, 2009, at A1. The increase in subpoenas leads to increased time that lab technicians spend in court, which in turn increases the Virginia lab's backlog of drug cases, which stood at 6,100 cases by the end of July 2009. *Id.*

Massachusetts also faces daunting volumes of cases to manage in the wake of *Melendez-Diaz*. During the past fiscal year, more than 20,000 drug cases were prosecuted in Massachusetts trial courts, and many thousands more await trial. Since *Melendez-Diaz*, Massachusetts state prosecutors have asked defendants to stipulate to the results of drug analysis. Defendants, however, have routinely declined to do so, instead insisting on their right to demand an analyst's presence at trial. Securing an analyst's presence at trial has resulted in numerous continuances and trial delays. It also has imposed substantial burdens on the 35 chemists currently employed by the state's drug laboratories. In fact, following *Melendez Diaz*, the average turnaround for drug analysis performed by the State Department of

Public Health has more than doubled, from 83 days in July 2008 to 169 days in July 2009. *Compare* July 2008 Drug Lab Report *with* July 2009 Drug Lab Report.

Rather than attending to essential laboratory work, these analysts must now travel to courtrooms to testify. Once there, analysts often must wait hours for their testimony. And, only then, will some defendants belatedly agree to stipulate to the test results. The more frequent scenario is that, after the analyst testifies on direct examination, defendants forego any cross-examination at all or ask only a few perfunctory questions about the test methods or laboratory certification.

In Indiana, two labs handle forensic testing for the entire state. In 2008, these two labs received several tens of thousands of items in 27,568 cases, but were able to complete the analysis in only 26,349 cases. Indiana State Police, 2008 Annual Report 51; Indianapolis-Marion County Forensic Services Agency, 2008 Annual Report 4-9. Specifically related to drugs, these labs received 13,903 cases, but had a backlog of 1,013 cases. Indianapolis-Marion County Forensic Services Agency, 2008 Annual Report 7; ISP Laboratory Division, 2008 Annual Report 2. Between them, these two labs have only 24 drug chemists. Indianapolis-Marion County Forensic Services Agency. 2008 Annual Report 7; Indiana State Police Laboratory, 2008 Annual Report 6.

The labs' backlogs will only grow following *Melendez-Diaz* unless the labs are able to increase exponentially their budgets for hiring technicians—an unlikely development even in good economic times. Outsourcing is also not a viable option. The State Police lab already outsources DNA tests owing to high volume, but now must strictly limit that practice because of the high cost of producing witnesses from outside labs at trial. In one case, Indiana officials must pay about $5,000 to produce two lab analysts whose DNA tests identified an unknown suspect in a rape case, but who left the employ of the lab where they conducted the tests several years earlier.

Other states experience similar problems. In Michigan, for example, State Police scientists have been logging, in the wake of *Melendez-Diaz*, 15 hours of overtime per week trying to reduce a backlog of forensic evidence. Rebecca Waters, *Supreme Court Requires Lab Analysts to Testify: Now What?*, Forensic Magazine, July 24, 2009. And in North Carolina, "with regard to blood or urine tests, the State is in a particularly egregious situation as there are only 8 to 12 analysts handling blood and urine tests for all 100 counties in the State[.]" *Supreme Court Ruling in Melendez-Diaz Requires the State to Produce the Chemical Analyst in All DWI Prosecutions*, Carolina Newswire, Aug. 7, 2009.

In New York, the Manhattan medical examiner's office experiences such high personnel turnover that in many cases the pathologist who performs an

autopsy is no longer employed at the office when the case goes to trial. Tom Jackman, *Prosecutors Worried By High Court Ruling on Lab Evidence*, Washington Post, July 15, 2009. As a consequence, prior to *Melendez-Diaz*, the accepted practice for Manhattan criminal courts was to admit autopsy reports without testimony from the analyst. *Id.* Further, it is New York's practice to use an assembly-line-like rotation system for DNA analysis, sometimes involving up to 40 analysts per case. Following *Melendez-Diaz*, this practice raises difficult questions regarding who must testify as to the results of any given DNA test.

In some states, the main problem is not the volume of cases so much as the distance from the lab to the courtroom. Because of this, Oregon district attorneys sometimes do not even bother to bring lower-level drug charges because they know it will be too difficult to produce a lab-technician. Ben Conery, *States Scramble to Keep Techs in Labs, Out of Courts*, Washington Times, Aug. 31, 2009, at A1. Similarly, in some South Dakota counties, a "round trip (for the lab analyst) is going to be 10 to 12 hours to testify." Tom Jackman, *Prosecutors Worried By High Court Ruling on Lab Evidence*, Washington Post, July 15, 2009. Even if prosecutors are willing to undertake that expense, lab analysts who devote that much time to testifying in court will inevitably leave behind an ever-growing backlog of testing.

These experiences are a few examples of how States are seeing, in the wake of *Melendez-Diaz*, the

potential for skyrocketing costs associated with drug and other forensic-evidence prosecutions. What the States have learned is that the need for flexibility in dealing with confrontation demands involving lab analysts in drug cases is particularly acute. Petitioner's interpretation of the Confrontation Clause would threaten—if not destroy—many workable solutions for balancing the needs of prosecutors against the often-frivolous demands of defendants who, even when the lab analyst testifies as part of the case-in-chief, have no realistic prospects for successfully challenging the validity of lab results.

C. States have been exploring a variety of ways to manage demands to confront lab analysts in court

States differ in how they investigate and prosecute drug crimes, including with respect to how they have been responding to *Melendez-Diaz*. As described below, some have had in place, even prior to *Melendez-Diaz*, statutes and practices that balance confrontation rights with the need to avoid wasteful production of unwanted witnesses. Others have been looking to sister states for procedural models or have been devising practices of their own. The States' objectives in developing these procedures is to control the high cost of producing lab technicians to testify in every drug case, either by winnowing frivolous confrontation demands or by making the means of securing analyst testimony more efficient (such as by allowing qualified

surrogates to testify or by allowing testimony by video conference). If the Court were to adopt Petitioners' absolutist approach to in-court lab-analyst confrontation, however, all States would struggle even more with the overwhelming cost of producing analysts to testify in the case-in-chief at every drug (and other forensic-evidence) trial.

1. *Notice-and-Demand Procedures*

As the name implies, a notice-and-demand statute requires (1) the State to give notice of its intent to introduce a certificate of analysis *in lieu* of live testimony, and (2) the defendant to then demand the technician's presence at trial. *See Melendez-Diaz*, 129 S.Ct. at 2527, 2541 ("In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial.").

The objective of notice-and-demand statutes is to winnow the number of cases where analyst testimony will be necessary. Without a notice-and demand rule, the prosecution must introduce analyst testimony on every case where it seeks to introduce a certificate of the analyst's test results. The theory behind having such a rule is that, if defendants bear some burden to assert their lab-analyst confrontation rights in advance of trial, there will

ultimately be appreciably fewer cases where analysts must appear at trial.

Virginia: Here, the Court has been asked to review Virginia's notice-and-demand statute, which provides that a certificate of analysis may be admitted into evidence if filed with the clerk at least seven days prior to the hearing or trial. Va. Code Ann. § 19.2-187. Defense counsel can obtain a copy of the certificate by making a request to the clerk at least 10 days before trial. *Id.* The defendant then has the right to call the analyst and "examine him in the same manner as if he had been called as an adverse witness." Va. Code § 19.2-187.1. The Supreme Court of Virginia interpreted this as a notice-and-demand statute. *Magruder v. Commonwealth*, 657 S.E.2d 113, 120 (Va. 2008).

Massachusetts: After the Court's decision in *Melendez-Diaz*, the Governor of Massachusetts, at the request of the Attorney General and district attorneys, submitted proposed legislation to formalize the procedures governing admission of drug analysis certificates at trial. The proposed legislation is modeled on the standard notice-and-demand statutes cited in the majority's decision in *Melendez-Diaz*, 129 S.Ct. at 2541, and is currently pending before the Massachusetts legislature.

Ohio: Prior to *Melendez-Diaz*, Ohio required a prosecutor to serve a copy of the lab report on the defendant before trial with an explanation of the defendant's right to demand confrontation and the

manner in which to make that demand. *See* Ohio Rev. Code Ann. § 2925.51(B), (D). The State must produce at trial the individual who signed the report if, within seven days of receiving notice, the defendant so demands. *Id.* at § 2925.51(C). Ohio courts have not yet evaluated this statute in light of *Melendez-Diaz*.

Texas: If the prosecutor wishes to avoid producing the analyst in court, Texas requires the State to file a copy of the certificate to be introduced with the clerk of the court and to deliver a copy to the defendant at least twenty days in advance of trial. *See* Tex. Code Crim. Proc. Ann art. 38.41. The certificate is not admissible, and the analyst will be required to appear, if the defendant files a written objection to the use of the certificate at least ten days before trial. *See id.*

2. *Anticipatory Demand Requirements*

Anticipatory demand statutes require the defendant to demand analyst testimony, but they do not require the State to provide notice of intent to introduce a certificate of analysis; rather, they operate on the premise that certificates of analysis are invariably produced during pre-trial discovery anyway.

Colorado: Colorado allows admission of a certificate of analysis *in lieu* of live testimony unless a defendant demands cross-examination "at least ten

days before the date of such criminal trial." *See* Colo. Rev. Stat. Ann. § 16-3-309.

Oregon: Oregon requires a defendant to file written notice with the court and the district attorney of his intent to object to a report's findings "not less than 15 days prior to trial." Or. Rev. Stat. § 475.235(5). The Court of Appeals of Oregon determined that, pursuant to *Melendez-Diaz*, a prior version of its statute (requiring defendants to subpoena the analyst if they wanted to object to the report) violated the Sixth Amendment. *State v. Willis*, 213 P.3d 1286, 1289 (Or. Ct. App. 2009). The anticipatory demand statute, however, has not been similarly invalidated.

3. *Video Conferencing*

Louisiana: Louisiana has recently passed legislation allowing laboratory employees, coroners, forensic pathologists and other people in the forensics field to testify via "simultaneous transmission through audiovisual equipment." 2009 La. Sess. Law Serv. Act 272 (H.B. 119). Testimony may be so provided so long as the opposing party receives thirty-days notice prior to the testimony. *Id.* Either party may still subpoena the witness for in-person testimony, but the defendant or his attorney must certify that they intend to perform, in good faith, cross-examination of the witness. *Id.*

Michigan: The Michigan State Police have created a video testimony program where analysts

may testify from their own labs. Rebecca Waters, *Supreme Court Requires Lab Analysts to Testify: Now What?*, Forensic Magazine, July 24, 2009. This rule allows the analysts to testify multiple times on the same day. *Id.* Michigan estimates that this program has reduced both their blood alcohol and drug testing backlogs, and saves analysts on average thirteen-and-a-half hours when compared to traditional in-court testimony. *Id.*

Montana: Similarly, the practice in Montana is for prosecutors to call crime lab analysts to testify via the Montana Judicial Video Network, a program that has interconnected many of the courts in the state to each other and various other entities, including the state crime lab. *See* Montana Supreme Court—Information Technology, http://www.montanacourts.mt.gov/cao/technology/it_video_confer.asp.

4. *Testimony by Surrogates*

Indiana: As in many states, prior to *Melendez-Diaz* the Indiana Rules of Evidence permitted prosecuting attorneys to admit certificates of analysis to prove the results of forensic laboratory testing as part of their cases-in-chief. Ind. Rule. Evid. 803. The State's implicit default rule in the wake of *Melendez-Diaz* has been for prosecutors to present lab analysts during their cases-in-chief, regardless of whether the defendant has expressed any desire to cross-examine the analyst. A recent Indiana Supreme Court decision may help ease that burden insofar as it allowed, in a DNA testing case,

the testimony of a lab supervisor rather than the actual testing technician. *See Pendergrass v. State*, 913 N.E.2d 703, 708-09 (Ind. 2009).

New Hampshire: Prior to *Melendez-Diaz*, the New Hampshire Supreme Court determined that a toxicologist may testify concerning lab reports because the preparing analyst probably would not remember the specific test and thus "[a]ny such analyst's testimony would have been identical to [the expert's] testimony 'as it would concern . . . general knowledge of the [laboratory's] test procedures and protocols, quality control measures, specific levels of review and chain of custody matters.'" *State v. Silva*, 960 A.2d 715, 720-21 (N.H. 2008) (quoting *State v. O'Maley*, 932 A.2d 1, 13 (N.H. 2007)).[1]

California: A majority (but not all) of California's courts have found that if a contemporaneous report is prepared at the time of testing, and live testimony, not necessarily by the preparer, accompanies the report, the resulting testimony is not in violation of *Melendez-Diaz*, because the reports were not "near-contemporaneous[,]" and thus are non-testimonial. *People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 376-77 (Cal. Ct. App. 2009); *see also People v. Geier*, 161 P.3d 104 (Cal. 2007).

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[1] New Hampshire also allows analysts to testify via video teleconference if notice is given and the defendant does not object. N.H. Rev. Stat. Ann. § 516:37.

* * *

The *amici* States are not advocating a particular statute or practice for admitting forensic laboratory test results into evidence. The States merely request that the Court reject Petitioner's overly restrictive interpretation of what the Confrontation Clause requires. The States should be allowed flexibility to develop rules that both protect the opportunity to cross-examine guaranteed by the Sixth Amendment and conserve scarce state crime-fighting resources.

II. The Confrontation Clause's Core Purposes Are Fulfilled if States Make Analysts Available for Cross-Examination at Trial

"The Confrontation Clause provides two types of protections for a criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987) (citing *Delaware v. Fensterer*, 474 U.S. 15, 18-19 (1985) (*per curiam*)); *see also Mattox v. United States*, 156 U.S. 237, 244 (1895) ("the substance of the constitutional protection is . . . seeing the witness face to face, and . . . subjecting him to the ordeal of a cross-examination"). These rights, however, are "not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *see also Maryland v. Craig*, 497 U.S. 836, 850 (1990) ("the face-to-face confrontation requirement is not

absolute"). Thus, although "the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial," that preference "must occasionally give way to considerations of public policy and the necessities of the case." *Craig*, 497 U.S. at 849 (emphasis in original) (citations omitted).

Similarly, although "the main and essential purpose of confrontation is *to secure for the [defendant] the opportunity for cross-examination*," *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (emphasis in original)), a defendant has no right to "cross-examination that is effective in whatever way, and to whatever extent, the defense may wish." *Id.* at 679 (quoting *Fensterer*, 474 U.S. at 20).

Like other Sixth Amendment rights, the Confrontation Clause "must also be interpreted in the context of the necessities of trial and the adversary process." *Craig*, 497 U.S. at 850. As such, it is subject to reasonable state regulation. *See Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S.Ct. 2527, 2541 (2009) ("States are free to adopt procedural rules governing" defendant's assertion of Confrontation Clause rights); *Van Arsdall*, 475 U.S. at 679 ("trial judges retain wide latitude insofar as the Confrontation Clause is concerned"). So long as the "defense is given a full and fair opportunity to probe and expose [testimonial] infirmities [such as forgetfulness, confusion, or evasion] through cross-examination, thereby calling to the attention of the

factfinder the reasons for giving scant weight to the witness' testimony," the Confrontation Clause's core purposes are "generally satisfied." *Fensterer*, 474 U.S. at 22.

Respondent's statutory scheme governing the admission of drug analysis certificates at trial satisfies these core constitutional requirements. As interpreted by the Virginia Supreme Court, it provides defendants with the right to demand that the State produce an analyst for face-to-face confrontation. *Magruder v. Commonwealth*, 657 S.E.2d 113, 120-21 (Va. 2008) ("the defendants could have insured the physical presence of the forensic analysts at trial by issuing a summons for their appearance at the Commonwealth's cost, *or asking the trial court or Commonwealth to do so*.") (emphasis added). Moreover, assuming timely demand is made, defendants have a full and fair opportunity to cross-examine an analyst at trial. *See id.* at 121 (noting that, had demand for the analyst been made, "defendants could have cross-examined them"). The Confrontation Clause requires nothing more. *Fensterer*, 474 U.S. at 22.

The Confrontation Clause does not preclude States from requiring defendants to provide timely pretrial notice of their intent to demand face-to-face confrontation with the drug analysts. Nor, assuming timely demand is made, does the Confrontation Clause preclude States from adopting reasonable procedural rules governing when drug analysis certificates may be admitted into evidence or when

cross-examination of analysts may occur. *See Taylor v. Illinois*, 484 U.S. 400, 411 (1988) ("The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.").

A. Statutes requiring defendants to demand an analyst's presence at trial impose no impermissible burden on Confrontation Clause rights

The Court already has recognized that "[t]here is no conceivable reason why [a defendant] cannot . . . be compelled to exercise his Confrontation Clause rights before trial." *Melendez-Diaz*, 129 S.Ct. at 2541. As the Court explained: "The defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so." *Id.* (emphasis in original). States "are free to adopt procedural rules" governing when notice of a Confrontation Clause objection must be provided and, further, to deem any such objection waived should defendant fail to comply with those rules. *Id.* (citing *Wainright v. Sykes*, 433 U.S. 72, 86-87 (1977)); *see also Taylor v. United States*, 414 U.S. 17, 19 (1973) (Confrontation Clause rights may be waived).

The Court has upheld similar pretrial notice provisions in a variety of contexts. In *Michigan v. Lucas*, 500 U.S. 145, 150 (1991), for instance,

defendant was precluded from presenting evidence of his own past sexual conduct with a rape victim because he failed to give advance notice of this defense as required by the State's rape-shield statute. The statute's notice provisions, the Court noted, "represent[ed] a valid legislative determination that rape victims deserve heightened protection against surprise, harassment, and unnecessary invasions of privacy. The statute also protect[ed] against surprise to the prosecution." *Id.* Thus, there was no constitutional barrier to the State's enforcement of those notice provisions.

Similarly, in *Williams v. Florida*, 399 U.S. 78, 79 (1970), the Court upheld a State rule that required defendants to provide pretrial notice of any alibi defense. The Court observed that this notice requirement "by itself in no way affected [defendant's] crucial decision to call alibi witnesses. . . . At most, the rule only compelled [defendant] to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that [he] planned to divulge at trial." *Id.* at 85.

The Virginia Supreme Court properly concluded that Respondent's notice-and-demand statute promotes similar state interests by "protecting against surprise, harassment, and undue delay." *Magruder*, 657 S.E.2d at 121 (quoting *Lucas*, 500 U.S. at 152-53). These are not fanciful concerns, particularly in the wake of the Court's decision in *Melendez-Diaz*.

In the vast majority of drug cases, defendants do not contest the results of drug analysis. *See Melendez-Diaz*, 129 S.Ct. at 2542 (quoting Brief for the District Attorneys in Support of the Commonwealth in No. SJC-09320 (Mass.), p.7). Instead, the primary contested issues in drug cases usually revolve around whether the evidence sufficiently links defendant to the drugs, not the accuracy of the scientific testing confirming that the substances are, in fact, drugs. *See, e.g., id.* at 2547-48 (Kennedy, J., dissenting). Given these practical realities, the *Melendez-Diaz* majority thought it "unlikely that defense counsel will insist on live testimony whose effect will be merely to highlight rather than cast doubt upon the forensic analysis." *Id.* at 2542.

Unfortunately, the majority's assumptions have not been borne out in the day-to-day practice of State trial courts. Emboldened by the Court's holding in *Melendez-Diaz*, defendants and their counsel have been increasingly unwilling to stipulate to the admission of drug analysis certificates, even when they have no intention or motivation to dispute the accuracy of that evidence. Defendants and their counsel have instead adopted a wait-and-see strategy, insisting on the defendant's constitutional right to confrontation and hoping that the State will be unable to produce a qualified analyst to testify at trial. If not, the prosecution is forced either to seek a continuance to secure an analyst's presence at trial, present substitute evidence to prove the composition and weight of the drugs, or agree to reduce, or even

dismiss, the charges against the defendant. *See id.* at 2557 (Kennedy, J., dissenting) (observing that defendants "will insist upon concessions: a plea bargain, or a more lenient sentence in exchange for relinquishing" the right to demand an analyst's presence at trial).

"Given the prospect of such a windfall (which may, in and of itself, secure an acquittal)," there is no downside to defendants in undertaking this gamble. *See id.* at 2557 (Kennedy, J., dissenting). At worst, the State will succeed in securing an analyst's presence at trial: only then will a defendant belatedly stipulate to the analyst's testimony or (more likely) simply forego the opportunity for cross-examination altogether. By that point, however, the State will have needlessly expended substantial time, effort, and money to secure an analyst's presence at trial.

Requiring analysts to appear in court, even when the substance of their testimony is not contested, imposes other needless burdens on States as well. It diverts analysts from their primary responsibilities of conducting scientific testing on drug samples, increases the already substantial backlog of cases awaiting forensic testing, delays the scheduling of drug cases for trial, and, in some circumstances, results in "[g]uilty defendants [going] free." *See id.* at 2550 (Kennedy, J., dissenting). States have a substantial interest in avoiding these threats to the fair and efficient administration of justice. If defendants do not contest the validity of the

underlying scientific analysis, drug analysis certificates should be admitted without requiring the "formalistic and pointless" presence of an analyst as a witness at trial. *See id.* at 2547 (Kennedy, J., dissenting).

Notice-and-demand statutes, like that enacted by Virginia, are intended "to protect the defendant's constitutional rights and yet relieve the prosecution of producing the analyst when scientific proof *is not a contested issue* in the case." *State v. Miller*, 790 A.2d 144, 152 (N.J. 2002) (emphasis in original) (quoting Paul Giannelli, *The Admissibility of Laboratory Reports in Criminal Trials: The Reliability of Scientific Proof*, 49 Ohio St. L. J. 671, 700 (1988)). By requiring defendants to give advance notice of their objections to the admission of drug analysis certificates, notice-and-demand statutes help "weed out prior to trial those cases in which there is a contest over the scientific proof and with respect to which the State will be required to produce a witness or prove why one is not necessary." *Miller*, 790 A.2d at 156. In addition, pretrial notice provisions avoid the prospect of States being unfairly surprised by an "eleventh-hour defense" and the delays in trials that invariably result from such last-minute defense tactics. *See Taylor*, 484 U.S. at 412.

Requiring a defendant to provide pretrial notice of a Confrontation Clause objection to the admission of drug analysis certificates "does not deny a defendant the opportunity to cross-examine the

[analyst], but simply requires that the defendant decide prior to trial whether he will conduct a cross-examination. The statute provides the opportunity for confrontation—only the timing of defendant's decision is changed." *Magruder*, 657 S.E.2d at 125 (quoting *Hinojos-Mendoza v. People*, 169 P.3d 662, 668 (Colo. 2007)).

Moreover, compliance with State pretrial notice provisions imposes no impermissible burden on defendant's exercise of Confrontation Clause rights. *See Planned Parenthood v. Casey*, 505 U.S. 833, 873 (1992) ("not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right"); *cf. Crawford v. Marion County Election Bd.*, -- U.S. --, 128 S.Ct. 1610, 1621 (2008) (requiring voters to present identification "does not qualify as a substantial burden on the right to vote"). "Lawyers are accustomed to meeting deadlines. Routine preparation involves location and interrogation of potential witnesses and the serving of subpoenas on those whose testimony will be offered at trial. The burden of identifying them in advance of trial adds little to these routine demands of trial preparation," *Taylor*, 484 U.S. at 415-16, and is easily justified by the States' legitimate interests in promoting the "orderly conduct of a criminal trial." *Id.* at 411.

B. Statutes providing defendants with an opportunity to cross-examine an analyst during the defense case are likewise constitutionally permissible

Petitioners next contend that the Confrontation Clause requires that cross-examination of a government witness, like an analyst, may only occur during the prosecution's case-in-chief and that requiring a defendant to cross-examine an analyst during the defense case amounts to improper burden shifting. *See* Pet'r.'s Br. 15-16, 20-21. As noted in Respondent's Brief, these arguments are entirely speculative because Petitioners never demanded an analyst's presence at trial and, thus, the "trial court never had occasion to address the proper order of proof." Resp't.'s Br. 16 (quoting *Magruder*, 657 S.E.2d at 122).

Assuming, however, this were a live issue, it does not implicate any Confrontation Clause rights. In the usual case, when a timely demand for an analyst's testimony is made, the witness will be called as part of the prosecution's case and cross-examination will take place at that stage of the trial. Thus, both of the core rights secured by the Confrontation Clause—face-to-face confrontation and cross-examination—are protected. In some circumstances, however, an analyst may not be available to testify during the prosecution's case-in-chief because of scheduling or other constraints. Rather than delaying the trial to secure an analyst's presence or directing a verdict for the defense, States

may meet their burden of proof by introducing certificates of analysis through another witness, *e.g.*, the arresting officer, subject to producing an analyst for cross-examination at a later stage of the trial. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) (the Confrontation Clause "does not bar admission of a statement so long as the declarant is present at trial to defend or explain it").

Nothing in the Confrontation Clause's text or history suggest that it is in any way concerned with controlling the order of proof at trial. So long as defendant is provided with an opportunity to confront and cross-examine an analyst at trial, the Confrontation Clause is satisfied. *See Fensterer*, 474 U.S. at 22; *see also United States v. Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994) ("Neither the Confrontation Clause nor the Due Process Clause restricts a trial judge's broad discretion to exercise reasonable control over the order in which litigants interrogate witnesses and present evidence."). It is offended only when a certificate of analysis is admitted into evidence, without affording defendant an opportunity to confront an analyst and, through cross-examination, to test the analyst's "honesty, proficiency, and methodology." *Melendez-Diaz*, 129 S.Ct. at 2538; *see also Van Arsdall*, 475 U.S. at 678-79 ("exposure of a witness' motivation for testifying is a proper and important function of the constitutionally protected right of cross-examination") (quoting *Davis*, 415 U.S. at 316-317).

Whether this opportunity for cross-examination of the analyst occurs during the prosecution case, the defense case, or rebuttal is constitutionally irrelevant because, regardless of when the cross-examination occurs, the jury will be able to assess the analyst's demeanor and evaluate what weight, if any, to give his testimony. That is all the Confrontation Clause requires. *See Craig*, 497 U.S. at 846; *Fensterer*, 474 U.S. at 22.

This result is consistent with the common law view that "an *alteration of the prescribed customary order* [for presentation of witnesses and evidence] is always allowable in the *discretion of the trial court.*" 6 John H. Wigmore, *Evidence in Trials at Common Law* § 1867 (Chadbourn ed. 1976) (emphasis in original). Indeed, the Court has recognized that trial judges have broad discretion to determine "the order of introducing evidence, and the times when it is to be introduced[.]" *Philadelphia & Trenton R.R. Co. v. Stimpson*, 39 U.S. 448, 463 (1840); *see also Geders v. United States*, 425 U.S. 80, 86 (1976) ("The trial judge must meet situations as they arise and . . . [t]o this end, he may determine generally the order in which parties will adduce proof; his determination will be reviewed only for abuse of discretion."); *Goldsby v. United States*, 160 U.S. 70, 74 (1895) (even assuming testimony "should have been more properly introduced in the [prosecution's] opening [case], it was purely within the sound judicial discretion of the trial court to allow it [during the prosecution's rebuttal case], which discretion, in the absence of gross abuse, is not reviewable here").

Parties historically have had no "strict right"—under the Confrontation Clause or otherwise—to insist on any particular order of proof at trial. *See Wood v. United States*, 41 U.S. 342, 361 (1842) ("the order in which the proof should be brought to establish [a claim], was rather a matter in the discretion of the court, than of strict right in the parties").

Rule 611(a) of the Federal Rules of Evidence reflects this common law approach to the order of proof. It likewise confers discretion on trial courts to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence[.]" Fed. R. Evid. 611(a). Numerous states have adopted substantively identical evidentiary rules. *See, e.g.*, Ala. R. Evid. 611(a); Alaska R. Evid. 611(a); Ariz. R. Evid. 611(a); Ark. R. Evid. 611(a); Colo. R. Evid. 611(a); Del. R. Evid. 611(a); Haw. R. Evid. 611(a); Idaho R. Evid. 611(a); Ind. R. Evid. 611(a); Ky. R. Evid. 611(a); La. Code Evid. Ann. art. 611(a); Me. R. Evid. 611(a); Mich. R. Evid. 611(a); Minn. R. Evid. 611(a); Miss. R. Evid. 611(a); Mont. R. Evid. 611(a); N.C. Gen. Stat. § 8C-1, Rule 611(a); N.D. R. Evid. 611(a); Ohio R. Evid. 611(a); S.C. R. Evid. 611(a); S.D. Codified Laws § 19-14-18; Tex. R. Evid. 611(a); Utah R. Evid. 611(a); Vt. R. Evid. 611(a); Wash. R. Evid. 611(a); W. Va. R. Evid. 611(a); Wyo. R. Evid. 611(a). Relying on these evidentiary rules, state and federal courts "frequently have exercised their discretion . . . to permit deviations from [the] conventional order of proof." 28 Charles

A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6164 (1993) (collecting cases).

Notice-and-demand statutes, like the Virginia statute here, are merely a variation on this theme. They permit (but do not require) certificates of analysis to be admitted during the prosecution's case-in-chief so long as the State makes an analyst available for cross-examination before the close of all the evidence. In this way, States preserve the traditional flexibility that courts have exercised with regard to the order of proof at trial.

Maintaining this flexibility is particularly important in drug prosecutions, given the volume of cases pending in state courts and the increasing demands placed on analysts to complete scientific testing on thousands of samples in a timely manner and appear in court whenever defendants demand it. States have a substantial interest in ensuring that their continued ability to prosecute drug offenses will not be compromised by Petitioners' overly-rigid interpretation of the Confrontation Clause. *See Taylor*, 484 U.S. at 411; *see also Stimpson*, 39 U.S. at 463 (recognizing that Congress has authority to "prescribe some fixed, general rules" regarding the mode of conducting trials, including the order of interrogation and presentation of evidence).

Moreover, allowing cross-examination of a prosecution witness to take place during the defense case does not impermissibly conflate the Confrontation Clause with the Compulsory Process

Clause. *See* Pet'r.'s Br. at 20-21. Once a timely demand for the analyst is made, the burden of producing the analyst falls squarely on the prosecution, not the defense. Thus, the "consequences of adverse-witness no-shows" is not improperly shifted from the "State to the accused." *See Melendez-Diaz*, 129 S.Ct. at 2540. Rather, the prosecution retains the burden of producing all adverse witnesses; the defendant is not required to "bring those adverse witnesses into court." *See id.* In order to eliminate any potential confusion raised by changing the customary order of proof, trial judges can issue appropriate jury instructions.

III. The Court Should Consider Overruling *Melendez-Diaz*

Overruling a case only a few months after it was decided is hardly common, but the Court should consider that option here. For the reasons given by Justice Kennedy in his *Melendez-Diaz* dissent, it follows from neither history nor precedent that Sixth Amendment confrontation rights apply to technicians who compile forensic lab reports from tests conducted by machines. If there is any possibility that the Court might ever reconsider *Melendez-Diaz*, it is far better to do it now rather than wait for state criminal justice systems to be overwhelmed with demands for lab technicians to testify (needlessly) at trial.

A. *Stare decisis* permits reconsideration of criminal procedure rights

"*Stare decisis* is not an inexorable command[.]" *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Rather, "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106 (1940), overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935).

"Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . the opposite is true in cases such as the present one involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828 (citations omitted). Indeed, "[t]he doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law[.]" *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result)).

It bears mentioning that the Court's recent Confrontation Clause cases are themselves products of a willingness to overturn prior holdings. *See Crawford*, 541 U.S. 36 (2004) (overturning *Ohio v. Roberts*, 448 U.S. 56 (1980)). The *Crawford* Court

stated that even though the case could have been decided under the existing line of cases, "we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion." *Id.* at 67.

The relative youth of the precedent being revisited does not preclude overturning it. This Court has, on many occasions, reversed itself in short order when necessary. *See Knox v. Lee (Legal Tender Cases)*, 79 U.S. 457, 554 (1871), *overruling Hepburn v. Griswold*, 75 U.S. 603 (1870) ("Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made"); *see, e.g., Daniels v. Williams*, 474 U.S. 327 (1986), *overruling Parratt v. Taylor*, 451 U.S. 527 (1981) (concerning lack of due care in Fourteenth Amendment cases); *United States v. Rabinowitz*, 339 U.S. 56, 65 (1950), *overruling Trupiano v. United States*, 334 U.S. 699 (1948) (concerning reasonableness of warrantless searches); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *overruling Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (concerning saluting the flag during the pledge of allegiance).

The fact that *Melendez-Diaz* is a recent decision actually makes overruling it even less problematic

because its holding is not yet fully entrenched in statutes and case law. States, for the most part, still have pre-*Melendez-Diaz* statutes in place, so overruling it would not disrupt established practices. *See generally Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977), overruling *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) (finding that "[s]ince one system of resolution of property disputes has been adhered to from 1845 until 1973, and the other only for the past three years, a return to the former would more closely conform to the expectations of property owners than would adherence to the latter."). In that respect, *Melendez-Diaz* is different from *Miranda v. Arizona*, 384 U.S. 436 (1966), which the Court refused to overrule because it "has become embedded in routine police practice to the point where the warnings have become part of our national culture." *Dickerson v. United States*, 530 U.S. 428, 433 (2000). *See also Crawford*, 541 U.S. at 75-76, (Rehnquist, C.J., concurring in the judgment) (questioning the decision to overturn *Roberts*—"a case decided nearly a quarter of a century ago").

Furthermore, *Melendez-Diaz* is already proving unworkable. As described in Part I, *supra*, States face the potential for exponentially more expensive drug prosecutions. Also, state courts have reached widely divergent results as to whether there are limits to what *Melendez-Diaz* holds. In three of the nation's most populous states, California, New York and Texas, courts have struggled to apply *Melendez-Diaz* in a consistent manner. A few courts read

Melendez-Diaz to require the lab technician who conducted a forensic test to testify as to the accuracy of the test before the court. *See People v. Lopez*, 98 Cal. Rptr. 3d 825, 829 (Cal. Ct. App. 2009); *Cuadros-Fernandez v. State*, 2009 WL 2647890 at *9-10 (Tex. Ct. App. Aug. 28, 2009); *People v. Heyanka*, 2009 WL 2951011 at * 2 (N.Y. Dist. Ct. Aug. 19. 2009). Others find lab reports not to be "testimonial" if created contemporaneously with the test. *See People v. Gutierrez*, 99 Cal. Rptr. 3d 369, 376-77 (Cal. Ct. App. 2009) (permitting surrogate testimony to accompany a lab report created at the time of testing); *People v. Palmer*, 885 N.Y.S. 2d 621 (N.Y. App. Div. 2009) ("the admission into evidence of a laboratory report containing DNA profile data prepared by a laboratory analyst who did not testify at trial did not violate [the defendant's] Sixth Amendment right to confrontation . . . as the report did not constitute a testimonial statement").

While the Court may ultimately resolve these disagreements, the more important point is what the decisional conflicts reflect: a need for criminal trial courts to cope with *Melendez-Diaz* without quashing substantial swaths of forensic-evidence-based prosecutions. That need in itself suggests something deeply amiss with regard to *Melendez-Diaz*. The upshot is that *Melendez-Diaz* so drastically upends longstanding state criminal procedures, and for such dubious legitimate benefits to defendants, that the Court should revisit whether, in the context of forensic lab tests conducted by machines, there

really is a witness whose confrontation is guaranteed by the Sixth Amendment.

B. For confrontation purposes, there are meaningful differences between lab analysts and conventional witnesses

The Court's holding in *Melendez-Diaz* that crime-lab certificates are "testimonial statements" and that lab analysts are "'witnesses' for purposes of the Sixth Amendment" is not a "straightforward application" of *Crawford*. *Melendez-Diaz*, 129 S.Ct. at 2532, 2533. *Crawford*, *Davis*, and *Hammon* all "dealt with ordinary witnesses—women who had seen, and in two cases been the victim of, the crime in question." *Id.* at 2543 (Kennedy, J., dissenting). Those cases say nothing about whether a report from a test conducted by a machine is "testimonial."

As Justice Kennedy observed, the majority in *Melendez-Diaz* "ma[de] no attempt to acknowledge the real differences between laboratory analysts who perform scientific tests and other, more conventional witnesses—'witnesses' being the word the Framers used in the Confrontation Clause." *Id.* There is an inherent and obvious difference between "conventional witnesses—one who has personal knowledge of some aspect of the defendant's guilt—" and analysts who test substances and prepare scientific reports showing their findings. *Id.* As he explained, the Confrontation Clause does not "refer[] to a kind of out-of-court statement—namely, a testimonial statement—that must be excluded from

evidence. . . . Nor does the Clause contain the word 'testimonial.' The text, instead, refers to kinds of persons, namely, to 'witnesses against' the defendant." *Id.* at 2550.

A type of witness similar to the lab technicians at issue here existed at the time of the Founding—the copyist. *Id.* at 2552. Before photocopies, prosecutors relied on copyists to transcribe important records for trial. "If the copyist falsifie[d] a copy, or even misspell[ed] a name or transpose[d] a date, those flaws could lead the jury to convict. Because so much depend[ed] on his or her honesty and diligence, the copyist often prepare[d] an affidavit certifying that the copy [wa]s true and accurate." *Id.* at 2553. This certificate would certainly be a "testimonial statement" under *Melendez-Diaz*, but was "accepted without hesitation by American courts" at the time of the Founding. *Id.* (citing, *e.g.*, *United States v. Percheman*, 7 Pet. 51, 85, 8 L.Ed. 604 (1833)). Therefore, it is clear that "the framing generation, in contrast to the Court today, did not consider the Confrontation Clause to require in-court confrontation of unconventional authors of testimonial statements." *Id.*

This history is significant because it underscores the "primary object" of the Confrontation Clause, which is to terminate the admissibility of *ex parte* examinations, "the principal evil at which the Confrontation Clause was directed." *Crawford*, 541 U.S. at 50. That is, the Confrontation Clause provides a defendant with the opportunity, "not only

of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox v. United States*, 156 U.S. 237, 242-43 (1895); *see also California v. Green*, 399 U.S. 149, 156 (1970) (the "particular vice that gave impetus to the confrontation claim was the practice of trying defendants on 'evidence' which consisted solely of *ex parte* affidavits or depositions secured by the examining magistrates"). The Confrontation Clause thus protects defendants from out-of-court statements made by "human witnesses," who observed the crime or actions related to the crime. *Melendez-Diaz*, 129 S.Ct. at 2551 (Kennedy, J., dissenting). In that regard, when applied to human witnesses who must recall "potentially criminal past events," cross-examination works well. *Davis v. Washington*, 547 U.S. 813, 830 (2006).

Confrontation and cross-examination do not work well, however, with respect to the work of copyists and lab technicians, which is undertaken under circumstances not even remotely resembling *ex parte* witness interviews and affidavits. Laboratory reports are not human recollections of past criminal events; they are transcriptions of machine-produced data concerning faceless samples, making the *machine*, not the human, the declarant. Similarly, it is the document itself, not the copyist, that was considered by the Framers to be the declarant.

Melendez-Diaz, 129 S.Ct. at 2553 (Kennedy, J., dissenting).

Placing either the machine or the technician into the "crucible of cross examination," *Crawford*, 541 U.S. at 61, does not satisfy any of the Confrontation Clause's objectives. First, machines of course cannot be cross examined, and they have no "conscience" to "sift" or "demeanor upon the stand." *Mattox*, 156 U.S. at 242, *see also United States v. Washington*, 498 F.3d 225, 230 (4th Cir. 2007) (holding that "raw data generated by the machines were not hearsay statements as implicated by the Confrontation Clause").

Second, technicians who report machine test results are not adequate substitutes for the machines as witnesses. Although technicians may interpret raw test data in some fashion and draw conclusions from it, they do not act as "witnesses against" defendants in any meaningful sense. "After all, the analyst is far removed from the particular defendant and, indeed, claims no personal knowledge of the defendant's guilt." *Melendez-Diaz*, 129 S.Ct. at 2548 (Kennedy, J., dissenting). Unlike examining victims, accomplices, and other witnesses with personal knowledge of the crime and related events, cross-examining technicians about a particular defendant's case provides little, if any, insight into the composition of the drugs in question beyond what is contained in the report. "The Confrontation Clause is simply not needed for these matters. Where . . . the defendant does not even

dispute the accuracy of the analyst's work, confrontation adds nothing." *Id.* at 2549.

Melendez-Diaz is not only burdensome, but also unnecessary and misdirected at scientific procedures rather than live-witness accounts. It should therefore be overruled.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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MARK A. BRISCOE and SHELDON A. CYPRESS

Petitioners,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

On Writ Of Certiorari
To The Supreme Court of Virginia

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BRIEFS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THE STATUTORY SUBPOENA ALTERNATIVE IS NO SUBSTITUTE FOR THE SIXTH AMENDMENT RIGHT TO CONFRONTATION. 4

A. The Sixth Amendment Confrontation Guarantee Affords a Defendant a Particular Procedure for Challenging the Prosecution's Case Which, Because of the Way it Allocates Burdens to the Prosecution and Affords Opportunities to the Defense, Ultimately Promotes Justice. 4

B. The Subpoena Alternative Is A Completely Different and Less Effective Means of Adversarial Testing That Diminishes the Accuracy and Reliability of Our Criminal Justice System. 14

II. THE VERY DIFFERENT PROCEDURE AFFORDED BY THE SUBPOENA METHOD IS NOT JUSTIFIED BY A SKY-WILL-OTHERWISE-FALL RATIONALE. 20

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Connecticut v. Johnson,
460 U.S. 73 (1983) 11

Crawford v. Washington,
541 U.S. 36 (2004) ..... *passim*

Davis v. Alaska,
415 U.S. 308 (1974) 8

Davis v. Washington,
126 S. Ct. 2266 (2006) 1, 20

Delaware v. Van Arsdall,
475 U.S. 673 (1986) 7

Ford v. Wainwright,
477 U.S. 399 (1986) 10

In re J.W.,
763 A.2d 1129 (D.C. 2000) 16

Kentucky v. Stincer,
482 U.S. 730 (1987) 5

Magruder v. Commonwealth,
657 S.E.2d 113 (Va. 2008) 2

Maryland v. Craig,
497 U.S. 836 (1990) 4, 5

Melendez-Diaz v. Massachusetts,
129 S. Ct. 2527 (2009) ..... *passim*

People v. Carruth,
2009 WL 2564832 (Cal. Ct. App. Aug. 19,
2009) 21

People v. Dungo,
2009 WL 2596892 (Cal. Ct. App. Aug. 24,
2009) 10, 21

People v. McClanahan,
729 N.E.2d 470 (Ill. 2000) 22

People v. Rutterschmidt,
2009 WL 2506333 (Cal. Ct. App. Aug. 18,
2009) 21

Richter v. Hickman,
2009 WL 2425390 (9th Cir. Aug. 10, 2009) 11

State v. Barnette,
481 So. 2d 788 (Miss. 1985) 20, 21

State v. Belvin,
986 So. 2d 516 (Fl. 2008) 9, 23

State v. Birchfield,
157 P.3d 216 (Or. 2007) 6, 23

State v. Christensen,
607 A.2d 952 (N.H. 1992) 24

State v. Clark,
964 P.2d 766 (Mont. 1998).....22

State v. Miller,
790 A.2d 144 (N.J. 2002) 24

Taylor v. Illinois,
484 U.S. 400 (1988).....4, 5

Thomas v. United States,
914 A.2d 1 (D.C. 2006).....14, 22

United States v. Caudle,
606 F.2d 451 (4th Cir. 1979).....10

United States v. Mulinelli-Navas,
111 F.3d 983 (1st Cir. 1997) 11

United States v. Oates,
560 F.2d 45 (2d Cir. 1977) 26

In re Winship,
397 U.S. 358 (1970).....15

CONSTITUTION AND STATUTES

U.S. Const. amend. VI 4

18 U.S.C. § 3500(b).....8

Colo. Rev. Stat. Ann. § 16-3-309 (1984).....23

10 Del. C. § 4332(a)(1) (1994) 23

Iowa Code Ann. § 691.2 (1988) 24

Maine Rev. Stat. tit. 17-A, § 1112(1) (2001).....24

Md. Code Ann. Cts & Jud. Proc. §10-306 (1973).....23

Minn. Stat. § 634.15 (2007).....24

N.C. Gen Stat. Ann. § 90-95(g) (1997).....24

N.J. Stat. Ann. § 2C:35-19 (1988).....24

N.H. Rev. Stat. § 318-B:26a (1981) 23

S.D.C.L. § 23-3-19.3 (1996) 24

Tex. Code Crim. Proc. Ann. Art. 38.41 §4 (2003).....24

Va. Code Ann. § 9.1-1101.....27

Va. Code Ann. § 19.2-187.1.....26, 27

Va. Code Ann. § 46.2-341.26:9.....27

MISCELLANEOUS

1A *Criminal Defense Techniques* §24 A.02[1][d] (Sidney Bernstein *et al.* eds., 2008) 7

Sir William Blackstone, 3 *Commentaries on the Laws of England* (1765-69 ed.).....5

5 *Wigmore on Evidence* §1368 (Chadbourne rev. 1974).....12

Paul C. Giannelli, Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 791 (1991) 17

Robert J. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* 36-37 (1990) 15

Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chi. Trib., Oct. 21, 2004 17

Agency Strategic Plan, Department of Forensic Science available online at http://www.vaperforms.virginia.gov/agency level/stratplan/spReport.cfm?AgencyCode= 778 6

Fed. R. Crim. P. 26.2 8

S.C. R. Crim. P. 6 (1994).....24

Wash. St. Super. Ct. Cr. 6.13 (2000) 24

INTEREST OF *AMICI CURIAE*

The Public Defender Service for the District of Columbia ("PDS") provides and promotes quality legal representation to indigent adults and children facing a loss of liberty in the District of Columbia. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit association of criminal defense lawyers with a national membership of more than 10,000 attorneys.[1] Amici have a longstanding interest in ensuring that the right to confrontation is fully realized and protected. Both PDS and NACDL appeared as amicus curiae in *Davis v. Washington*, 126 S. Ct. 2266 (2006) and NACDL appeared as amicus curiae in *Crawford v. Washington*, 541 U.S. 36 (2004) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009).

SUMMARY OF ARGUMENT

Amici write to ensure that the Court has the defender's perspective on the very real differences between the confrontation guarantee and the subpoena alternative for forensic analysts endorsed by the Virginia Supreme Court and codified in a handful of other state codes. A defendant's Sixth Amendment right to be confronted with the prosecution's witnesses is, as this Court explained in *Crawford v. Washington*, 541 U.S. 36, 61 (2004), and

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[1] The parties have consented to the filing of this brief. No counsel for any party authored any part of this brief, and no person or entity, other than *amici*, has made a monetary contribution to the preparation or submission of this brief.

reaffirmed in *Melendez-Diaz*, 129 S. Ct. at 2536, "a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner." A statutory acknowledgement of a defendant's right to call a prosecution witness in the defense case does not "adequately protect[] a criminal defendant's rights under the Confrontation Clause" as the Supreme Court of Virginia erroneously concluded below, *Magruder v. Commonwealth*, 657 S.E.2d 113, 118 (Va. 2008), because it does not afford the defense the same procedure as the traditionally conceived and constitutionally mandated confrontation right. It does not require the government to bear its burden of presenting to the trier of fact live testimony, under oath, from its forensic analyst in its case in chief. It does not permit the defense to determine whether and how to conduct its cross-examination against the backdrop of the prosecution's case. It does not afford the defense the same opportunity to question the prosecution's forensic analyst selectively or to challenge his inculpatory evidence with the same immediacy. And because of these procedural differences, the subpoena alternative for forensic analysts fails to achieve the same benefits of confrontation – namely, to allocate risks, afford opportunities, and ultimately create incentives for prosecutors and their witnesses to act with greater care and honesty to the advantage of the criminal justice system.

Equating the confrontation guarantee with the very different procedure of the subpoena

alternative is not justified by a sky-will-otherwise-fall rationale. The sky has not fallen in those jurisdictions that require the prosecution to present the live testimony of a forensic analyst if a defendant so desires. In these jurisdictions where prosecutors have shouldered their constitutional burden for years, if not decades, the criminal justice system continues to function: drug cases are prosecuted, guilty pleas are entered, and trials at which forensic analysts testify in person for the prosecution are had. These jurisdictions have accepted that the burden of bringing a forensic analyst to court to testify for the prosecution is simply part of the cost of our criminal justice system. Ensuring that state forensic science departments have adequate resources to fulfill their duties in both the laboratory and the courtroom is the responsibility of the legislature and the executive. In Virginia the General Assembly and the Governor have already taken steps to address the increased demand for testimony by its forensic analysts. Thus, Virginia itself demonstrates that compliance with the Sixth Amendment's right to confrontation is entirely feasible and that replacing the confrontation guarantee with an entirely different subpoena alternative is wholly unnecessary.

ARGUMENT

I. THE STATUTORY SUBPOENA ALTERNATIVE IS NO SUBSTITUTE FOR THE SIXTH AMENDMENT RIGHT TO CONFRONTATION.

A. The Sixth Amendment Confrontation Guarantee Affords a Defendant a Particular Procedure for Challenging the Prosecution's Case Which, Because of the Way it Allocates Burdens to the Prosecution and Affords Opportunities to the Defense, Ultimately Promotes Justice.

The right to confrontation has long been understood to "arise automatically on the initiation of the adversary process" without any action by the defense, *Taylor v. Illinois*, 484 U.S. 400, 410 (1988), and to require that the prosecution "confront" a defendant "with" its witnesses in the prosecution's case in chief. U.S. Const. amend. VI; *see also Melendez-Diaz*, 129 S. Ct. at 2533. There are four components to the confrontation guarantee: (1) it ensures that the defense will meet "face-to-face" with the prosecution's witnesses, *Crawford*, 541 U.S. at 57; (2) it requires those witnesses to testify under oath, *Maryland v. Craig*, 497 U.S. 836, 845-46 (1990); (3) it gives the trier of fact a first-hand "opportunity [to] observ[e] the quality, age, education, understanding, behavior, and inclinations of th[ose] witness[es]; in which points all persons must appear alike, when their depositions are

reduced to writing," Sir William Blackstone, 3 *Commentaries on the Laws of England* *374 (1765-69 ed.); and (4) it gives the defense the "opportunity" to question the prosecution's witnesses on cross-examination, *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987).

It is always the prosecution's prerogative to ask the defense to stipulate to the admission of unconfronted out-of-court statements. A statutory provision that merely formalizes the timetable for such a request does not alter the confrontation procedure and thus does not run afoul of the Sixth Amendment. Certainly, a defendant who knows in advance that there is nothing to be gained from confronting and cross-examining a prosecution witness would do well to attempt to keep that witness off the stand by agreeing to a stipulation.

If, however, the defense declines such a request, the prosecution must fulfill the first three elements of the confrontation guarantee – "physical presence, oath . . . and observation of demeanor by the trier of fact," *Craig*, 497 U.S. at 846 – in the course of the prosecution's case in chief. *Melendez-Diaz*, 129 S. Ct. at 2540 ("the Confrontation Clause imposes a burden on the prosecution to present its witnesses"); *see also Taylor v. Illinois*, 484 U.S. 400, 410 n.14 (1988) (the right "to be confronted with adverse witnesses . . . appl[ies] in every case, whether or not the defendant seeks to rebut the case against him or to present a case of his own") (internal quotation and citation omitted). Thus, the

prosecution at trial bears not only the burden of proof, but also the burden of proving its case in a particular way, through live testimony with all its attendant benefits and pitfalls.

Live testimony is almost always more compelling than a written statement, but there are considerable risks. The witness may fail to appear, leaving a hole in the evidentiary fabric of the prosecution's case. *See Melendez-Diaz*, 129 S. Ct. at 2540 (noting that the "consequences of adverse witness no-shows" are properly borne by the prosecution). This is a possibility with any witness, but should be less of a concern for the prosecution than for the defense when the witness is a state employee, like a forensic analyst. These witnesses are unlikely to unilaterally disregard a request to testify from the prosecution since the laboratory for which they work likely does the bulk of its work for prosecutors and law enforcement officers (as in the case in Virginia[2]), and the analysts and the prosecutors are effectively members of the same team. *Cf. State v. Birchfield*, 157 P.3d 216, 219 (Or. 2007) (noting the greater difficulties for the defense of putting a forensic analyst under subpoena and noting that the analyst, "in all likelihood, could be an

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[2] More than 99% of the work performed by the Department of Forensic Science is for law enforcement, medical examiners, or Commonwealth's Attorneys. *See* Agency Strategic Plan, Department of Forensic Science available online at http://www.vaperforms.virginia.gov/agencylevel/stratplan/spReport.cfm?AgencyCode=778.

adverse witness with no incentive to cooperate in that process").

There is also the risk that the witness who appears in court will make a poor showing for the prosecution on the stand. Documents are the safe choice, particularly when they are prepared in anticipation of litigation and say no more and no less than the prosecution wants them to say, as is certainly the case with a lab analyst's report. By contrast, when a witness takes the stand there is always a possibility that the witness will provide, even on direct, information that is inconsistent with prior statements or otherwise unhelpful to the prosecution or helpful to the defense. Just as important as the information a witness imparts is the witness's demeanor, which will affect how the trier of fact receives and evaluates the witness's testimony. *Delaware v. Van Arsdall*, 475 U.S. 673, 687 (1986) (Brennan, J., dissenting) ("Jurors evaluating the witnesses' demeanor may choose to give great weight to the testimony of one witness while ignoring the similar testimony of another."); 1A *Criminal Defense Techniques* §24A.02[1][d] (Sidney Bernstein *et al.* eds., 2008) ("A case is frequently only as strong as its witnesses."). Among other things, live witnesses may be confusing, inexact, longwinded, pompous, unconfident, obviously biased, or disturbingly cavalier about the subject matter of their testimony.

In short, requiring the prosecution to fulfill the first three elements of the confrontation

guarantee in its case in chief ensures that the prosecution bears the burden of ensuring the presence of its witnesses in court, that these witnesses are clearly identified as prosecution witnesses when they testify, and that any deficiencies with their direct testimony are charged to the prosecution.

Only after the prosecution has shouldered this burden and questioned its witness on direct does the fourth element of confrontation, cross-examination, come into play. *See Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). The confrontation guarantee allows a defendant to wait until this point in the trial – after the defense has received the discovery and expert notice it is due, after any prior statements of the witness have been disclosed pursuant to a *Jencks*-type rule,[3] and after the prosecution has presumably elicited from the witness on direct whatever inculpatory information the witness possesses – to make a final assessment about what cross-examination might accomplish and whether it will likely be helpful or harmful to the

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[3] *See* 18 U.S.C. § 3500(b) (mandating disclosure of prior statements by government witness to the defense upon defense request "[a]fter a witness called by the United States has testified on direct examination"); *see also* Fed. R. Crim. P. 26.2 (mandating disclosure of a witness's prior statements "on a motion of a party who did not call the witness").

defense to undertake it.

It may be that the defense, having observed the witness testify on direct examination, decides to forego cross-examination. This is a wholly legitimate exercise of the confrontation right. *See State v. Belvin*, 986 So. 2d 516, 525 (Fl. 2008) (holding that Florida's statutory subpoena alternative violated the confrontation guarantee because the defendant "has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements") (internal quotation and citation omitted). For example, it may be that the witness failed to testify in a way that materially hurts the defendant. Or it may be that the witness actually testified poorly for the prosecution (and thus favorably for the defense), and might only qualify his answers on cross-examination. Or it may be that the witness, in anticipation of cross-examination, was so scrupulous in his testimony that cross-examination would only emphasize the strength of the prosecution's evidence.

But more often than not, a defendant will elect to cross-examine the analyst. Cross-examination may be used to expose holes, inconsistencies, biases, or untruths in a prosecution witness's direct testimony and thereby to undermine the government's case. *United States v. Caudle*, 606 F.2d 451, 457 (4th Cir. 1979) ("The annals of the legal profession are filled with instances in which testimony, plausible when supplied on examination

in chief, has by cross-examination been shown to be . . . faulty or worthless.") (internal quotation and citation omitted). This is no less true for forensic analysts than for other prosecution witnesses. *Melendez-Diaz*, 129 S. Ct. at 2538 (affirming that confrontation of forensic analysts can test their "honesty, proficiency, and methodology"); *id.* at 2536 (noting that "[f]orensic evidence is not uniquely immune from the risk of manipulation"); *id.* at 2537 ("Like expert witnesses generally, an analyst's lack of proper training or deficiency in judgment may be disclosed in cross-examination."); *see also Ford v. Wainwright*, 477 U.S. 399, 415 (1986) (Cross-examination may be essential to meaningful evaluation of an expert's conclusions by the fact-finder by "bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, . . . the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report."); *cf. People v. Dungo*, 2009 WL 2596892 (Cal. Ct. App. Aug. 24, 2009) (Sixth Amendment violation where "[t]he prosecution's failure to call [the coroner] as a witness prevented the defense from exploring the possibility that he lacked proper training or had poor judgment or from testing his honesty, proficiency, and methodology. Notably, that was the prosecution's intent.").

Cross-examination may also be used to develop affirmative evidence for the defense. *United States v. Mulinelli-Navas*, 111 F.3d 983, 992 (1st

Cir. 1997) (recognizing that the right to confrontation encompasses right to "develop and present a defense" through cross-examination); *see also Connecticut v. Johnson*, 460 U.S. 73, 77 (1983) (acknowledging that the "defense theory" may be apparent "by the cross-examination of the State's witnesses"); *cf. Richter v. Hickman*, 2009 WL 2425390 at *18 & n.22 (9th Cir. Aug. 10, 2009) (finding a violation of defendant's Sixth Amendment right to effective assistance where counsel failed to elicit on cross-examination information supporting the defense theory of the case from the prosecution's serologist).

To this end, cross-examination may be pursued for reasons other than casting doubt on whether the materials tested were in fact a controlled substance. For example, to support a broader argument that a defendant charged with possession with the intent to distribute is guilty only of simple possession, the defense might want to conduct a limited cross-examination of the chemist focused on the purity of drugs tested to show that the small amount of drugs found on the defendant were mixed with a different cutting agent than the larger stash of drugs found in the vicinity of the defendant at the time of his arrest. Or to support the argument that the drugs were mistakenly linked to the defendant, the defense might want to elicit limited testimony from the chemist about his careful adherence to written protocols to compare his conduct against the less careful conduct and

collection of evidence by the police at the crime scene.

Because the opportunity to cross-examine the prosecution witness comes on the heels of the witness's direct examination, the defense has maximum flexibility pursuing these destructive and constructive goals. In the case of a forensic analyst, the defense can pinpoint the topics on which he wants the trier of fact to focus and precisely limit his cross-examination – unlike the prosecution which must give the trier of fact context for its expert's conclusions. Examined in isolation the information elicited may appear slight, but when amassed in closing argument, it may give the trier of fact a reasonable doubt as to defendant's guilt of the charged crime.

Contemporaneous cross-examination after the prosecution presents its witness on direct examination allows the defense to challenge the witness's testimony while it is still fresh in the jury's mind and before it becomes fixed and unchallengeable. *See* 5 *Wigmore on Evidence* §1368, at 38 (Chadbourne rev. 1974) ("[C]ross-examination *immediately succeeds* in time the direct examination. In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal."). To draw an artistic analogy, when a defendant is afforded the right to confrontation, the government is not allowed to complete its painting for the jury without interruption, thereby presenting a finished and

consequently more compelling picture. Instead, as the prosecution wields its brush, the defense follows immediately behind, challenging and, if successful, changing the picture as it is constructed.

This is the robust procedure acknowledged by the Sixth Amendment to be an end in itself – not simply a dispensable means to an end. And yet it is precisely because the Framers recognized that this procedure is the best means of promoting the truth-seeking function of a criminal trial that they elevated it to a constitutional guarantee. *Crawford*, 541 U.S. at 62 (the Framers recognized that the act of questioning the prosecution's proof "beats and bolts out the Truth much better") (internal citation and quotation omitted).

The constitutionally-guaranteed, routine and uniform opportunity for the defense to confront and cross-examine prosecution witnesses against the backdrop of the prosecution's case has power beyond the criminal trial. It creates incentives for the prosecution and its witnesses to act from the outset in a way that promotes justice. A forensic analyst who is alert to the possibility that he may be called by the prosecution as a witness to explain publicly, in court, under oath and subject to cross-examination what tests he performed, how he performed them and what results he obtained, is more likely to exercise care and exhibit honesty in all aspects of his work. *Melendez-Diaz*, 129 S. Ct. at 2537 ("[O]f course, the prospect of confrontation will deter fraudulent analysis in the first place."). By the

same token, a prosecutor who intends to present the testimony of a forensic analyst in his case in chief is more likely both to vet the evidence he receives from that witness and to insist that the analyst act with the requisite care. Thus the knowledge that a forensic analyst may be required to testify in the government's case in chief, subject to cross-examination by the defense, benefits the criminal justice system as a whole.

B. The Subpoena Alternative Is A Completely Different and Less Effective Means of Adversarial Testing That Diminishes the Accuracy and Reliability of Our Criminal Justice System.

In place of the specific confrontation procedure guaranteed by the Sixth Amendment, the subpoena rule endorsed by the Virginia Supreme Court offers the defense a completely different, far more dangerous, and far less effective mechanism for testing the prosecution's proof.

The subpoena method allows the prosecution to satisfy its burden of proof through presentation of the potentially "misleadingly pristine" affidavit of its forensic analyst, rather than through the live testimony of the witness. *Thomas v. United States*, 914 A.2d 1, 16-18 (D.C. 2006) (holding that the District of Columbia's subpoena alternative violated the Confrontation Clause). If the defense desires a face-to-face, under-oath encounter with the analyst, it must call this prosecution witness to testify in the defense case.

This distinct procedure forces the defense instead of the prosecution to assume the inherent risk of presenting live witness testimony. In the case of a forensic analyst who has already served as an affiant for the prosecution, this risk is magnified because it is certain that the witness, if he takes the stand, will testify in some way as to harm the defense. At the very least, he will adopt the forensic report as his own. To make matters worse, the jury may conclude that the defense is vouching for this adverse witness and sponsoring his damaging testimony. *See* Robert J. Klonoff & Paul L. Colby, *Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials* 36-37 (1990) (juries evaluate evidence by reference to the party introducing it; evidence unfavorable to a party is more damaging when the party introduces it than it is when the party's opponent introduces the same evidence).

The subpoena method also places a defendant's right to confront the prosecution's witnesses in direct conflict with his right not to put on any evidence and to hold the government to its burden of proof. *See In re Winship*, 397 U.S. 358, 361 (1970). The argument that the defense need not offer evidence of innocence and that the jury must look to the government to determine whether guilt has been proved beyond a reasonable doubt is necessarily diluted when the defense opts to put on witnesses in a separate defense case. Moreover, by presenting evidence, the defense invites the jury to compare the quantum and quality of the evidence it has presented against the evidence amassed by the

prosecution – a comparison that generally favors the prosecution and almost certainly would if the only witness the defense called were the forensic analyst.

Even when a defendant intends to present evidence in a defense case, the subpoena method may distort or distract the jury from the defense's main themes and arguments. Calling the analyst in the defense case – as opposed to cross-examining the analyst in the prosecution's case – may give that witness undue prominence. The jury may regard this testimony as the centerpiece of the defense, when in fact, the defense theory lies elsewhere.

The subpoena method also forces the defense to make the decision to take the risky step of putting the forensic analyst on the stand as a defense witness with insufficient information. Of course, and perhaps most importantly, the defendant will not have had the benefit of observing the witness's direct testimony in the prosecution's case in chief. But it is also likely that the defense will not have had the opportunity to interview the analyst pretrial if these witnesses align themselves with the prosecution and decline to cooperate with the defense. *See In re J.W.*, 763 A.2d 1129, 1134-37 (D.C. 2000) (defendant has no right to pretrial interview of government chemist to determine whether or not to subpoena him to testify at trial); *see also* Maurice Possley et al., *Scandal Touches Even Elite Labs: Flawed Work, Resistance to Scrutiny Seen Across U.S.*, Chi. Trib., Oct. 21, 2004 (analyst explains that the attitude in the lab is: "We

work for the good guys. We're the white hats."); *see also* Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 799 nn.52 & 53 (1991) (vast majority of crime laboratories in the United States are under police control and only examine evidence submitted by law enforcement); *n. 2 supra.*

While the defendant will have the lab report, as the record in this case demonstrates, this report is often cursory. *See* Joint Appendix at 4-8, 84-87 (noting only weight of item and that it contained cocaine, but failing to document, inter alia, the testing method used, the protocols followed, the purity of the drugs, or the cutting agents employed); *see also Melendez-Diaz*, 129 S. Ct. at 2537 ("The affidavits submitted by the analysts contained only the bare-bones statement that '[t]he substance was found to contain: Cocaine.'") (internal citation omitted); Paul C. Giannelli, *Criminal Discovery, Scientific Evidence, and DNA*, 44 Vand. L. Rev. 791, 803 (1991) (lab reports often merely "summarize[] the results of an unidentified test conducted by an anonymous technician") (internal quotation and citation omitted). Beyond the lab report, the defendant may have little or nothing else – not the lab notes, not the analyst's curriculum vitae, not any prior statements made by the analyst.

Finally, questioning a prosecution witness in the defense case is likely to be a very different – and ultimately less effective – enterprise than questioning the prosecution witness on cross-

examination. The defense questioning of the prosecution's witness will not follow immediately after the introduction of the witness's out-of-court statement by the prosecution, and thus may have less impact on the trier of fact. Moreover, the defense cannot use the witness's testimony on direct as a backdrop, focus on discrete topics, and highlight only information that hurts the prosecution or helps the defense. Rather the defense would first have to conduct some version of what would have been the prosecution's direct – to establish for the trier of fact who the witness is and what inculpatory evidence he has to support the prosecution's case before challenging it. For its part, the prosecution will get the benefit of "cross-examining" its own witness and will be able to direct its questions only to information that strengthens its case and undercuts the defense.

For all of these reasons, the very different procedure for ensuring the live in-court testimony of prosecution witnesses afforded by the subpoena method is a risky venture for the defense, and defendants are unlikely to use it. But by making in-court questioning an uncommon, irregular occurrence, the subpoena method robs the adversarial system of many of the incentives that promote accuracy and reliability in our criminal justice system. As discussed above, a forensic analyst who has little expectation of being hailed into court has less incentive to be careful and may feel at greater liberty to omit, misrepresent or even fabricate information in his report because he has no

expectation of follow-up questioning. Likewise, when the prosecution has little or no expectation that its analysts will have to testify in court, it has a reduced incentive to scour its evidence and vet its witnesses. As a consequence, the prosecution may unwittingly rely on conclusions that are faulty or without foundation.

* * *

In sum, the confrontation guarantee and the subpoena method offer two very different procedures for questioning a prosecution witness, only one of which satisfies the Sixth Amendment. *See Melendez-Diaz*, 129 S. Ct. at 2540 (a defendant's power to subpoena a prosecution witness " – whether pursuant to state law or the Compulsory Process Clause – is no substitute for the right of confrontation"); *id.* at 2536 (acknowledging that there may be "other ways – and in some cases better ways – to challenge or verify the results of a forensic test. But the Constitution guarantees one way: confrontation."). Moreover, because the subpoena method imposes unfair burdens on the defense and perverts the incentives of the prosecution and its witnesses, to equate the two procedures would diminish the right to confrontation and weaken our adversarial system of criminal justice.

II. THE VERY DIFFERENT PROCEDURE AFFORDED BY THE SUBPOENA METHOD IS NOT JUSTIFIED BY A SKY-WILL-OTHERWISE-FALL RATIONALE.

A number of states already require the forensic analyst to testify live in the government's case in chief when the government seeks to rely on forensic tests, absent consent or a valid waiver by the defense. Many have done so for years. Others have changed their practice in anticipation of this Court's decisions in *Crawford, Davis* and *Melendez-Diaz*. "Perhaps the best indication that the sky will not fall after" clarification from this Court that the burden to present live testimony under the confrontation clause cannot be shifted to the defense "is that it has not done so already." *Melendez-Diaz*, 129 S. Ct. at 2540.

Numerous state courts have held that, absent a valid waiver by the defense, the burden falls to the prosecution to fulfill the constitutional confrontation guarantee by presenting live testimony of a forensic analyst when it seeks to rely on forensic test results. For example, over twenty years ago, the Supreme Court of Mississippi held in *State v. Barnette*, 481 So. 2d 788 (Miss. 1985), that the defendant's right to confrontation had been violated when the prosecution admitted into evidence the certificate of a non-testifying lab analyst to prove that the substance the defendant was charged with selling was cocaine. The court held that "[t]o allow, without the consent of the defendant, this essential element

to be proven solely by a certificate of the analyst impermissibly lessens the constitutionally required burden which is on the state." *Id.* at 791. Accordingly, the court determined that the certificate of analysis was only admissible if the prosecution presented the testimony of the forensic analyst or if the prosecution and the defense negotiated a stipulation to the contents of the report. *Id.* at 792. Likewise it has been the historical practice in California,[4] New York, and Michigan, *see* Pet.'s Br. at 25 n.10, to require the prosecution to present live testimony of any witness on whose out-of-court testimonial statement it seeks to rely without distinguishing forensic analysts.

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[4] In California, the courts uniformly agree that the prosecution bears the burden of presenting the live testimony of a forensic analyst when it seeks to rely on the results of forensic tests. The question that has produced a split of authority among the lower appellate courts, however, is whether the prosecution must put the author of the report on the stand to fulfill the defendant's right to confrontation or whether it is sufficient for another analyst or supervisor to testify in the author's stead. *See, e.g., Dungo*, 2009 WL 2596892 (Sixth Amendment violation where a pathologist testified in reliance on an autopsy report that he himself did not create); *People v. Carruth*, 2009 WL 2564832 (Cal. Ct. App. Aug. 19, 2009) (unpublished) (Sixth Amendment violation where a forensic toxicologist testified about another forensic toxicologist's curriculum vitae and about the nature of the lab report the other toxicologist generated); *People v. Rutterschmidt*, 2009 WL 2506333 (Cal. Ct. App. Aug. 18, 2009) (No Sixth Amendment violation where the director of the lab testified based on toxicology reports prepared by other analysts).

Similarly, a number of states have over the years determined that a statute like Virginia's that imposes on the defendant "the burden of subpoenaing the State's [forensic analyst] in order to present a full defense and enjoy his constitutionally protected rights under the Confrontation Clause" violates the Sixth Amendment confrontation guarantee. *State v. Clark*, 964 P.2d 766, 772 (Mont. 1998); *see also People v. McClanahan*, 729 N.E.2d 470, 477 (Ill. 2000) ("emphatically reject[ing] any notion that the State's constitutional obligation to confront the accused with the witnesses against him can be satisfied by allowing the accused to bring the State's witnesses into court himself and cross-examine them as part of his defense.")[5]; *Thomas*, 914 A.2d at 16 (observing that "rights of confrontation and compulsory process are not interchangeable"); *State v. Birchfield*, 157 P.3d at 220 (holding that "the right to meet an opposing witness face to face cannot be transformed into a duty to procure that opposing witness for trial"); *Belvin*, 986 So. 2d at 525 (finding it "[i]mportant[]," if not dispositive, that "the burden of proof lies with the state, not the defendant").

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[5] The Illinois Supreme Court also determined that the notice-and-demand statute did not pass constitutional muster because it imposed an obligation on the defendant to take an affirmative step to get the benefit of the confrontation guarantee and did not ensure a voluntary, knowing, and intelligent waiver from the defendant of his right to confrontation. 729 N.E.2d at 477.

The prevalence of "notice-and-demand statutes" provides further evidence that the preservation of the true confrontation guarantee will not be the downfall of our criminal justice system. *Melendez-Diaz*, 129 S. Ct. at 2541. These statutes "in their simplest form require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial." *Id.* If the defendant does object, the prosecution is prohibited from admitting the test results into evidence in the absence of live testimony from the analyst. Maryland passed such a statute in 1973. Md. Code Ann. Cts & Jud. Proc. §10-306(b)(2)(1973). Other states have operated under similar notice and demand statutes or rules for many years. *See,, e.g.*, New Hampshire, N.H. Rev. Stat. § 318-B:26a (1981);[6] Colorado, Colo. Rev. Stat. Ann. § 16-3-309 (1984); Iowa, Iowa Code Ann. § 691.2 (1988); New Jersey, N.J. Stat. Ann. § 2C:35-19 (1988);[7] South

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[6] The New Hampshire Supreme Court held that the statutory requirement that the defendant state particular grounds for his objection to the admission of the certificate in the absence of live testimony violated the right to confrontation. *State v. Christensen*, 607 A.2d 952, 953-54 (N.H. 1992).

[7] Although New Jersey's statute requires that the defendant give grounds for his objection to the admission of the unconfronted lab report, the New Jersey Supreme Court correctly held in *State v. Miller*, 790 A.2d 144, 153 (N.J. 2002) that the statute could not be interpreted to impose any

Carolina, S.C. R. Crim. P. 6 (1994); Delaware, 10 Del. C. § 4332(a)(1) (1994); South Dakota, S.D.C.L. § 23-3-19.3 (1996); North Carolina, N.C. Gen Stat. Ann. § 90-95(g) (1997); Washington, Wash. St. Super. Ct. Cr. 6.13 (2000); Maine, Maine Rev. Stat. tit. 17-A, § 1112(1) (2001); Texas, Tex. Code Crim. Proc. Ann. Art. 38.41 §4 (2003); Minnesota, Minn. Stat. § 634.15(2)(a) (2007).

This landscape of historical practice, judicial decisions, and statutory authority demonstrates that the cost of affording defendants their right to be "confronted with the witnesses against" them can be borne. For years prosecutors in these jurisdictions have been shouldering their burden to present live testimony when defendants desire it. Yet these jurisdictions still have functioning criminal justice systems: drug cases are prosecuted, guilty pleas are entered, and trials at which forensic analysts testify in person for the prosecution are had.

Moreover, whatever increased burden realizing the true confrontation guarantee imposes on the states, it is a cost that *must* be borne. It is the cost of doing business in our criminal justice system. This Court in *Melendez-Diaz* acknowledged the hard truth that prosecuting people costs money. 129 S. Ct. at 2540 (noting that a cost-savings rationale for limiting the right to confrontation proves too much as any of the criminal justice

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"barrier, beyond notice, to defendant's exercise of his right to confrontation."

protections of the Constitution could just as easily be scrapped under the same reasoning). Specifically, designating courts as the forum for evaluating the prosecution's evidence and requiring prosecutors to present live testimony from its witnesses in that forum is expensive, but it is the method our forebears insisted upon for assessing a defendant's guilt of a charged crime. *Crawford*, 541 U.S. at 62.

Any argument that forensic analysts are different from other prosecution witnesses because they have pressing duties in the laboratory ignores the forensic analyst's role as an adjunct to the prosecution. No one would argue that the prosecution should be relieved of its burden of calling its police investigators as witnesses in its case in chief because the police need to be out on the street fighting crime and investigating cases. It is accepted that it is part of a police officer's job to act as a professional witness for the prosecution when cases are tried. The same reasoning applies to forensic analysts who test materials to determine if they can be used as evidence in potential criminal prosecutions. When those cases go forward, it is the job of these analysts to testify in court for the prosecution about their test results. *See United States v. Oates*, 560 F.2d 45, 68 (2d Cir. 1977) (noting that the "role of the [DEA] chemist typically does not terminate upon completion of the chemical analysis and submission of the resulting report but participation continues until the chemist has testified as an important prosecution witness at trial").

Whether police are in a position to fulfill both their policing and their testifying duties or forensic analysts can fulfill their testing and testifying duties ultimately turns on staffing and funding decisions that are the province of the other two branches of government. And indeed, in Virginia, the General Assembly and the Governor have already taken swift action to ensure that the Department of Forensic

Science can meet its confrontation obligations post *Melendez-Diaz*. Specifically, to accommodate the new demands on forensic analysts' time, the General Assembly passed a bill (1) authorizing a notice and demand system that permits Commonwealth's Attorneys to rely on certificates of analysis at trial if they give the defense notice at least 28 days before trial and the defense does not object within 14 days, Va. Code Ann. § 19.2-187.1 (A & B); (2) affording prosecutors more leeway to obtain continuances of trial dates if necessary to obtain the testimony of a forensic analyst, Va. Code Ann. § 19.2-187.1(C); and (3) deleting provisions in the Virginia code that required the prosecution to prove by live testimony that breathalyzer machines had been properly calibrated. Va. Code Ann. § 9.1-1101(B)(3); *id.* § 18.2-268.9 (A & B); *id.* § 46.2-341.26:9. The Governor of Virginia signed this bill into law on August 21st, 2009.

The fact that Virginia has already taken the necessary steps to ensure that a defendant's confrontation rights are fully protected further belies any argument that the rule of *Melendez-Diaz* is unworkable and that the Sixth Amendment's confrontation guarantee must be replaced with a wholly different procedure in order to accommodate cost concerns.

CONCLUSION

For all the reasons set forth above, amici respectfully request that the judgment of the Supreme Court of Virginia be reversed.

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